Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

RICHARD TOMIC,

Petitioner,

v.

CATHOLIC DIOCESE OF PEORIA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

STEPHEN J. THOMAS
JACKSON THOMAS LLP
416 Main Street
Suite 717
Peoria, IL 61602
(309) 637-8888

PAUL R.Q. WOLFSON
COUNSEL OF RECORD
KELLEY BROOKE SNYDER
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Avenue NW
Washington, DC 20006
(202) 663-6000

QUESTION PRESENTED

Whether a ministerial exception to federal employment discrimination laws bars the courts from adjudicating an age-discrimination complaint brought by a lay employee of a religious organization who was terminated from a position not reserved for members of a particular faith, where the religious organization has raised no defense that the discrimination was religiously motivated.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Richard Tomic respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The decision of the court of appeals (Pet. App. 1a-11a) is reported at 442 F.3d 1036. The decision of the district court (Pet. App. 13a-19a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 4, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent provisions of the First Amendment, the Age Discrimination in Employment Act, and the Religious

Freedom Restoration Act are set forth in the appendix to this petition (Pet. App. 43a-45a).

STATEMENT

1. In March 1996, petitioner was hired by the Catholic Diocese of Peoria as the organist and music director for St. Mary s Cathedral in Peoria. In July 1998, petitioner assumed the additional position of organist and music director for the Diocese. He performed his duties in exemplary fashion until March 25, 2003, when he was terminated without warning and without any opportunity to appeal his termination. Just before his termination, petitioner was told that the Diocese was hiring a new organist and choir director to assist him. Petitioner was then 52 years old. He was replaced by someone around 30 years old. Pet. App. 14a, 22a-23a.[1]

As organist and music director of the Cathedral, petitioner s duties included preparing music, recruiting and training choir members, conducting rehearsals, and playing the organ at all weekend and special parish masses at the Cathedral. His duties as music director of the Diocese included maintaining records of resources and personnel, reviewing musical resources available, organizing logistics of presentations, presenting expenses for reimbursement, and submitting requests for salary payments. Pet. App. 1a-2a, 29a-38a. Neither position authorized petitioner to make decisions about Catholic liturgy. Petitioner agreed to accept the direction of the Director of the Office of Divine Worship, the Vicar General/Moderator of the Curia or the Bishop in the exercise of responsibilities. *Id.* at 30a.

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[1] This case was resolved on a motion to dismiss, and so the factual allegations in the complaint must be taken as true, and all reasonably drawn inferences must be drawn favor of petitioner. *See Hishon* v. *King & Spalding*, 467 U.S. 69, 73 (1984). There was no discovery in this case about the exact nature of petitioner s duties, his relationship to the hierarchy of the Diocese, or the Diocese s reasons, asserted or actual, for terminating petitioner.

Petitioner s employment was governed by the Diocese s Handbook of Personnel Policies, which covered such matters as lunch hours, vacation time, maternity leave, unemployment compensation, and health insurance benefits. Pet. App. 39a-42a. The Handbook stated that [t]he Diocese ... is an Equal Opportunity Employer, and candidates for employment shall be considered on the basis of their qualifications, without regard to race, color, sex, age, physical handicap, national origin, or ancestry, although preference is generally given to persons of the Roman Catholic faith. *Id.* at 42a. The Handbook nowhere suggests, however, that petitioner s positions were reserved for persons of the Catholic faith. A separate provision in the Handbook, covering [r]eligious [e]mployees, stated that [r]eligious working in the diocesan offices will be governed by the policies herein contained [*i.e.*, in the Handbook], except in cases in which there is a conflict between these policies and the obligation of their state in life, which conflicts were to be settled by church officials, including the Bishop. *Id.*

2. After exhausting his remedies with the Equal Employment Opportunity Commission, petitioner filed suit in district court, alleging that the Diocese had terminated him on account of his age, in violation of the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621. The Diocese did not answer the complaint and, in particular, did not assert that petitioner was terminated for any reason having to do with Catholic doctrine, or that petitioner was terminated because his performance of his duties had somehow impaired Catholic worship.[2] Rather, the Diocese argued that, as a matter of law, it could not be liable for age discrimination in firing petitioner because its actions fell within the judicially-

[2] In his complaint, petitioner noted that, just before his termination, he had had discussions with the Bishop s assistant, in which petitioner expressed his concern about the impact of *scheduling* of choir practices for Holy Week and Easter. The complaint does not suggest, however, that petitioner had any disagreements with anyone in the Church hierarchy about the substance of musical choices for holy worship, and the Diocese has made no such argument. *See* Pet. App. 22a-23a.

crafted ministerial exception to federal anti-discrimination laws. That exception, as explained below, is not rooted in the text of the major federal anti-discrimination statutes, but rather reflects a judgment that, in certain circumstances (on which the lower courts vary widely), it would be unconstitutional to apply those laws to decisions by religious organizations about the composition of their clergy.

The district court agreed with the Diocese that the ministerial exception applied here and dismissed the complaint. In so doing, the court rejected petitioner s arguments that the ministerial exception is inapplicable to this case because (a) petitioner was not an ordained member of the Catholic clergy and did not play a core religious function within the Church, and (b) he was not terminated for any religious reason, *i.e.*, any reason even assertedly based in Catholic doctrine. According to the district court, petitioner s duties and functions ... were integral to the spiritual and pastoral mission of the Diocese, thereby falling within the contours of the ministerial exception. As such, his claims ... involve ecclesiastical decisions that are placed beyond the subject matter jurisdiction of the Court by the Free Exercise Clause of the First Amendment. Pet. App. 18a.

3. The court of appeals affirmed. Pet. App. 1a-11a. The court first remarked that [f]ederal courts are secular agencies. They therefore do not exercise jurisdiction over the internal affairs of religious organizations. *Id.* at 2a. Further, the court elaborated, [e]ven if the suit does not involve an issue of religious doctrine, but concerns merely the governance structure of the church, the courts will not assume jurisdiction if doing so would interfere with the church s management. *Id.* at 3a-4a. This rule, the court stated, rested on the fundamental right of churches to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine. *Id.* at 4a (quotation omitted).

Based on those principles, the court concluded that federal anti-discrimination laws cannot provide any protection to ministers who suffer employment discrimination, even

when the reason for the discrimination has nothing to do with religious doctrine. The court reasoned that, in investigating employment discrimination claims by ministers against their church, secular authorities would necessarily intrude into church governance in a manner that would be inherently coercive, even if the alleged discrimination were purely nondoctrinal. Pet. App. 4a (quotation omitted).

The court acknowledged that [t]he ministerial exception, and the hands-off approach more generally, do not place the internal affairs of religious organizations wholly beyond secular jurisdiction. Pet. App. 5a. It noted, for example, that courts have adjudicated property disputes within congregations and claims for wages by employees of religious organizations. *See id.* These examples, the court stated, show that federal courts cannot always avoid taking a stand on a religious question. *Id.* For example, in a dispute over property between church components, even if the court were inclined to accept the word of the highest authority within the church as to the proper ownership of the property, at a minimum the court must determine what is that highest authority. *Id.* at 6a. Similarly, in a suit by a janitor for wages, a church could not avoid adjudication simply by asserting that the janitor was a minister ; the court would have to determine whether under the actual law of the church in question (and not as a subterfuge) janitors really were ministers. *Id.*

Nonetheless, the court concluded, those principles did not permit adjudication of this employment-discrimination suit. The court did note that [i]t might seem that unless a church had a doctrine placing limitations of age, race, ethnic origin, disability, or sex on ministers, the application of laws forbidding employment discrimination would not involve the court in theological controversy. Pet. App. 6a. But this is not correct, the court stated, because the church would be likely to defend its employment action on grounds related to church needs rooted in church doctrine. *Id.* And, the court speculated, if this case were allowed to go forward, the diocese would argue that he was dismissed for a religious rea-

son [petitioner s] opinion concerning the suitability of particular music for Easter services and the argument could propel the court into a controversy, quintessentially religious, over what is suitable music for Easter services. *Id.* at 6a-7a. The court also theorized that petitioner would argue that the church s criticism of his musical choices was a pretext for firing him, that the real reason was age ; that [t]he church would rebut with evidence of what the liturgically proper music is for an Easter Mass and [petitioner] might in turn dispute the church s claim. The court would be asked to resolve a theological dispute. *Id.* at 7a.[3]

The court also rejected petitioner s argument that his position as organist and music director should not implicate the ministerial exception because it did not involve religious duties. Pet. App. 7a. Without the benefit of any discovery in this case about petitioner s duties, the court stated that [a]mong [petitioner s] duties as music director was that of selecting the music to be played at the various masses. That duty required him to make a discretionary religious judgment because the Catholic Church does not have rules specifying what piece of music is to be played at each type of mass. *Id.*[4] Stressing that [m]usic is an integral part of many different religious traditions, the court further concluded that petitioner s tasks were traditionally ecclesiastical or religious. *Id.* at 8a (quotation omitted). The court acknowledged that [t]he rector or bishop could override [petitioner s] choices of what music to play, but that possible disagreement, the court again theorized, could convince the ecclesiastical authorities that they would be better off

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[3] In fact, the Diocese has never asserted that petitioner was fired for a religious reason. Nor has petitioner ever suggested that he would attempt to dispute any assertions by the Diocese about the liturgically proper music for an Easter Mass.

[4] For the proposition that the Catholic Church has no rules specifying what music is to be played at mass, the court relied not on anything in the record, but on a secondary source that had not been cited by either party. *See* Pet. App. 7a.

with someone else in the job. *Id.* Thus, the court concluded, if petitioner were protected from age discrimination by the ADEA, the ability of the church and the diocese to remove him will be inhibited unless the ministerial exception is applicable. *Id.*

The court found this case distinguishable from *DeMarco* v. *Holy Cross High School*, 4 F.3d 166 (2d Cir. 1993), in which the Second Circuit conclu`ed that the ministerial exception to the ADEA did not bar an age discrimination suit brought by a teacher at a Catholic high school. In *DeMarco*, the teacher alleged that he was fired because of his age; the school maintained that the teacher was fired because of his failure to perform religious duties, including failure to begin his classes with prayer and failure to attend Mass with his students. *Id.* at 168; *see* Pet. App. 8a. The court acknowledged that *DeMarco* was just across the line from this case. Pet. App. 8a. It nonetheless believed that *DeMarco* was significantly different because in that case, the fundamental question was whether De Marco either did or did not lead his students in prayer and attend mass. *Id.* at 8a-9a. Those issues, the court stated, were simple questions of fact, unlike the wisdom or propriety of [petitioner s] choice of music to play at an Easter Mass (*id.* at 9a) which neither party has put at issue in this case. The court also stated, again without the benefit of record evidence, that the music director of a Catholic church and diocese is more like a clergyman than a math teacher. *Id.*[5]

Finally, the court addressed *sua sponte* an issue raised by the Second Circuit s recent decision in *Hankins* v. *Lyght*,

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[5] Continuing its theme that, as a matter of law, a music director is equivalent to a clergyman, the court dismissed as insignificant the Diocese s Handbook, in which the Diocese represents itself to be an equal opportunity employer, specifically with respect to age. Pet. App. 9a. [I]t is very unlikely, the court suggested, that the representation should be interpreted to embrace religious functionaries, such as the music director. *Id.* The court noted that the Handbook forbids ... discrimination on the grounds of sex, though women of course cannot be Catholic priests. *Id.*

441 F.3d 96 (2d Cir. 2006), in which that court concluded that the ministerial exception to anti-discrimination laws has been superseded by the Religious Freedom Restoration Act (RFRA), 42 U.S.C. § 2000bb-1. The court noted that, if RFRA were applicable instead of the judicially-crafted ministerial exception, the courts have to decide whether application of the ADEA to a particular case imposes a substantial burden on religious activity. Pet. App. 10a. The court concluded that *Hankins* was unsound because RFRA is applicable only to suits to which the government is a party. *Id.* The court found it unlikely that Congress, dropping nary a hint, wiped out a long-established doctrine that gives greater protection to religious autonomy than RFRA does, and stated that a serious constitutional issue would be presented if Congress by stripping away the ministerial exception required federal courts to decide religious questions. *Id.* at 11a.

REASONS FOR GRANTING THE PETITION

A. This Court s Review Is Needed To Clarify The Application And Scope Of The Ministerial Exception To Employment Discrimination Law

The court of appeals held in this case that the Constitution forbids the courts from entertaining an employment discrimination complaint brought by a lay employee of a religious institution, even though that employee was not holding a position reserved for members of the faith, and even though the defendant employer has never contended that the employee was terminated for religious reasons. For that conclusion, the court relied on the so-called ministerial exception, which the lower courts have fashioned to prevent a collision between two interests of the highest order: the Government s interest in eradicating discrimination in employment and the constitutional right of a church to manage its own affairs free from governmental interference. [6]

[6] *EEOC* v. *Catholic Univ. of Am.*, 83 F.3d 455, 460 (D.C. Cir. 1996).

Although it is common ground that the Constitution places *some* limits on the application of employment discrimination laws to religious organizations, little else about the ministerial exception is certain. In the absence of guidance from this Court, which has never addressed the issue, the lower courts have reached varying positions on the scope of this exception.

The Fourth, Fifth, Seventh, and D.C. Circuits have articulated that exception generously (as demonstrated by the decision below), essentially ruling that no employment discrimination claim may ever be brought by a minister and also defining the category of minister broadly to include any lay employee whose function relates to the propagation of the church s religious message.[7] By contrast, the Second, Third, and Eighth Circuits have taken a narrower and more nuanced approach to the issue.[8] In those circuits, whether an employment discrimination complaint may proceed against a religious organization focuses primarily not on whether the employee had religious duties, but on whether the courts will have to resolve the validity of a religious reason proffered by the employer for the adverse employment decision.[9] The Ninth Circuit has held that even ministers

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[7] *See, e.g., EEOC* v. *Roman Catholic Diocese*, 213 F.3d 795 (4th Cir. 2000); *Rayburn* v. *General Conference of Seventh-Day Adventists*, 772 F.2d 1164 (4th Cir. 1985); *Starkman* v. *Evans*, 198 F.3d 173 (5th Cir. 1999); *Alicea-Hernandez* v. *Catholic Bishop of Chi.*, 320 F.3d 698 (7th Cir. 2003); *Catholic Univ.*, 83 F.3d 455.

[8] Although, as noted above, the Second Circuit has held that RFRA has displaced the judicially-created ministerial exception, its approach to the ministerial exception is still relevant for the insight it provides into how that court will assess whether neutral, generally applicable anti-discrimination statutes impose a substantial burden on religious organizations under RFRA.

[9] *See DeMarco* v. *Holy Cross High Sch.*, 4 F.3d 166 (2d Cir. 1993); *Geary* v. *Visitation of the Blessed Virgin Mary Parish Sch.*, 7 F.3d 324 (3d Cir. 1993); *Weissman* v. *Congregation Shaare Emeth*, 38 F.3d 1038 (8th Cir. 1994); *see also Petruska* v. *Gannon Univ.*, 448 F.3d 615 (holding that courts could adjudicate a sex-discrimination claim brought by a chaplain of a religious-affiliated university), *vacated for panel rehearing*, No. 05-1222,

may bring some kinds of employment discrimination claims (in particular, sexual harassment and retaliation claims, including those involving constructive discharge), although ministers may not bring claims based on the actual termination of their employment as such.[10] And as if this confusion were not enough, the Second Circuit has recently held that the entire ministerial exception has been superseded by the Religious Freedom Restoration Act a ruling that the court below squarely rejected.[11]

This Court s clarification of the permissible application of employment discrimination laws to religious organizations is sorely needed. The lower courts have found guidance from different lines of this Court s precedents to support their conclusions. The Fourth, Fifth, Seventh, and D.C. Circuits have emphasized this Court s decisions recognizing the autonomy of churches to settle their own internal affairs and stressing that courts may not adjudicate fundamentally religious controversies.[12] These circuits have read those decisions as requiring a judicially-created exception to the otherwise generally applicable anti-discrimination statutes. And they have reaffirmed this exception even in the wake of *Employment Division* v. *Smith*, 494 U.S. 872 (1990), which rejected the argument that the Free Exercise Clause re-

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2006 U.S. App. LEXIS 15088 (3d Cir. June 20, 2006). *But see Scharon* v. *St. Luke s Episcopal Presbyterian Hosps.*, 929 F.2d 360 (8th Cir. 1991) (concluding that courts could not adjudicate a priest s age and sex discrimination claims without running afoul of the First Amendment).

[10] *Compare Elvig* v. *Calvin Presbyterian Church*, 375 F.3d 951, 964-965 (9th Cir. 2004); *Bollard* v. *California Province of Soc y of Jesus*, 196 F.3d 940, 944-947 (9th Cir. 1999) *with Werft* v. *Desert Sw. Annual Conference of the United Methodist Church*, 377 F.3d 1099, 1100, 1104 (9th Cir. 2004) (per curiam).

[11] *See Hankins* v. *Lyght*, 441 F.3d 96 (2d Cir. 2006).

[12] *See, e.g., Serbian E. Orthodox Diocese* v. *Milivojevich*, 426 U.S. 696 (1976); *Presbyterian Church* v. *Mary Elizabeth Blue Hull Mem l Presbyterian Church*, 393 U.S. 440 (1969); *Kedroff* v. *St. Nicholas Cathedral*, 344 U.S. 94 (1952); *Gonzalez* v. *Roman Catholic Archbishop of Manila*, 280 U.S. 1 (1929).

quires exemptions from generally-applicable laws.[13] In their view, *Smith* only addressed an *individual s* Free Exercise right and is therefore inapplicable to statutes that govern *organizations*, which remain entitled to autonomy in their internal affairs.[14]

The Second, Third, Eighth, and Ninth Circuits have found more helpful guidance from this Court s decisions holding that religious organizations have no general immunity from an obligation to comply with secular law,[15] including *Smith* s holding that the Free Exercise Clause does not prohibit the application of neutral, secular legal principles to religious organizations.[16] Only this Court can make clear how the competing concerns of eradicating invidious employment discrimination and protecting the right of religious organizations to maintain their religious message free of governmental interference may be properly reconciled.

This case presents a particularly suitable vehicle for resolution of these issues. Under the decision below, a layperson who was fired because of his age has no legal recourse whatever even though the church has never contended that the termination of his employment had anything

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[13] 494 U.S. at 878-882; *see Catholic Univ.*, 83 F.3d at 461-463; *Combs v. Central Tex. Annual Conference of the United Methodist Church*, 173 F.3d 343, 347-350 (5th Cir. 1999); *Roman Catholic Diocese*, 213 F.3d at 800 n.*. The Seventh Circuit has not directly addressed the issue, although it has continued to apply the exception post-*Smith*, as it did below.

[14] *Catholic Univ.*, 83 F.3d at 461-463; *Combs*, 173 F.3d at 347-350; *Roman Catholic Diocese*, 213 F.3d at 800 n.*; *see also Bryce* v. *Episcopal Church*, 289 F.3d 648, 656-657 (10th Cir. 2002); *Gellington v. Christian Methodist Episcopal Church, Inc.*, 203 F.3d 1299, 1302-1304 (11th Cir. 2000).

[15] *See, e.g., Tony & Susan Alamo F[illegible]* v. *Secretary of Labor*, 471 U.S. 290 (1985); *United States* v. *Lee*, 455 [illegible]252 (1982); *Jones* v. *Wolf*, 443 U.S. 595 (1979); *Maryland & Va. Eldership of the Churches of God* v. *Church of God at Sharpsburg, Inc.*, 396 U.S. 367 (1970).

[16] *See, e.g., Geary*, 7 F.3d at 327; *Elvig* v. *Calvin Presbyterian Church*, 397 F.3d 790, 792 (9th Cir. 2005) (Fletcher, J., concurring in the denial of rehearing en banc).

to do with religious doctrine, and even though his position was not reserved for members of the Catholic faith. It is difficult to see why the constitutional value of protecting religious freedom shields this kind of action from legal scrutiny. Moreover and contrary to the court of appeals speculation about how this litigation might unfold if it were not dismissed on the pleadings there is no reason to believe that a court adjudicating petitioner s age discrimination case would be required to determine whether any *religious* justification that the Diocese might theoretically offer for petitioner s termination was valid under Catholic doctrine. The courts of appeals that have allowed discrimination complaints to proceed have made clear that, where a religious organization proffers a religious justification for an adverse employment action, the courts may not question whether that justification is in fact rooted in religious doctrine. Rather, the courts must confine their inquiry to determining whether that justification was *in fact* the reason for the adverse action, or whether the termination was actually motivated by a prohibited factor, such as age. This eminently practical approach appropriately balances the competing claims of anti-discrimination law and autonomy of religious organizations.

B. Lower Courts Disagree About The Application And Scope Of The Ministerial Exception

This case implicates two separate but related issues about the ministerial exception: first, who qualifies as a minister, and second, whether or not the plaintiff is deemed a minister, under what circumstances may a discrimination complaint against a religious organization proceed past the pleading stage? The lower courts have not adopted a consistent approach to either of these questions.

1. The First Amendment protects not only the rights of individual worshipers, but that of organized religious groups as well. This Court has long recognized the right to organize voluntary religious associations. [17] The First

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[17] *Kedroff*, 344 U.S. at 114 (quotation omitted).

Amendment grants these organizations power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine. [18] The [f]reedom to select the clergy, where no improper methods of choice are proven is similarly protected.[19]

Nevertheless, churches are not entitled to complete immunity from all government regulation or all judicial scrutiny of their conduct.[20] Courts have consistently adjudicated disputes involving contracts and property where resolution of the dispute could be made with reference to neutrally applicable laws and without adjudication of ecclesiastical questions.[21]

Anti-discrimination provisions like the ADEA are among those neutral and generally applicable statutes that are applicable to religious organizations. Certainly that was Congress s intent. Title VII of the Civil Rights Act of 1964, for example, contains no general exemption for religious organizations, and indeed its plain language indicates that Congress intended it to apply to religious organizations.[22]

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[18] *Id.* at 116.

[19] *Id.*

[20] *See Employment Div.*, 494 U.S. at 878-880 (explaining that generally applicable laws do not violate the Free Exercise Clause); *Tony & Susan Alamo Found.*, 471 U.S. at 305 (The Establishment Clause does not exempt religious organizations from such secular governmental activity as fire inspections and building and zoning regulations ....).

[21] *See e.g., Jones*, 443 U.S. at 606 (explaining that courts may resolve clams that involve the manner in which churches own property, *hire employees*, or purchase goods) (emphasis added); *Maryland & Va. Eldership of the Churches of God*, 396 U.S. at 367-368; *see also Presbyterian Church*, 393 U.S. at 449 (noting that courts may resolve disputes involving church property where they can do so without resolving underlying controversies over religious doctrine).

[22] Title VII expressly exempts religious organizations from its prohibition against discrimination on the basis of religion. *See* 42 U.S.C. § 2000e-1(a) (This subchapter shall not apply ... to a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational

The ADEA was modeled in pertinent part on Title VII, and courts have generally held that the ADEA applies to the personnel actions of religious institutions.[23]

Courts have recognized, however, that anti-discrimination provisions that interfere with a religious organization s choice of spiritual leaders could in some instances interfere with its First Amendment rights. To accommodate these concerns, courts have carved out a ministerial exception. The ministerial exception is not rooted in any textual provision of the pertinent anti-discrimination laws, but rather reflects the courts judgments about the limits that the Religion Clauses of the First Amendment place on the permissible application of those laws. Courts generally agree on the existence of such limits, but disagree on their scope, both with respect to who is covered and whether claims involving discrimination not motivated by religion are covered.[24]

2. One set of disagreements concerns who is properly considered a minister for purposes of the exemption. This inquiry is often dispositive because, in the circuits that have adopted a broad ministerial exception, any employment claim by a minister is barred, regardless of the actual or

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institution, or society of its activities.). The clear negative inference of this limited exemption is that Congress intended Title VII s other prohibitions against discrimination on the basis of race, sex, and national origin to apply to religious organizations, and indeed we have found no decision holding that Title VII or the ADEA is totally inapplicable to religious organizations.

[23] *See DeMarco*, 4 F.3d at 172-173 (concluding that Congress intended the ADEA to apply to religious institutions); *see also Geary*, 7 F.3d at 331; *Weissman*, 38 F.3d at 1045; *Ritter* v. *Mount St. Mary s Coll.*, 814 F.2d 986, 988 n.1 (4th Cir. 1987).

[24] Because the application of the ministerial exception amounts, in effect, to a determination that the pertinent law would be unconstitutional as applied to the particular case, the exception should be limited to what is necessary to comply with the First Amendment. *Bollard*, 196 F.3d at 947; *see also United States* v. *Booker*, 543 U.S. 220, 258 (2005) ([W]e must refrain from invalidating more of [a] statute than is necessary.) (quotation omitted).

asserted reason for the adverse personnel action. Thus, in the decision below, after the court of appeals concluded that petitioner was a minister (even though he is a layperson and held a position not reserved for Catholics), the court ruled that his case could not go forward, regardless of the actual or asserted reason for his termination. As the courts adopting a broad view of the exception have reasoned, the free exercise clause of the First Amendment protects the act of a decision rather than a motivation behind it, [25] and so [t]he [ministerial] exception precludes any inquiry whatsoever into the reasons behind a church s ministerial employment decision. [26]

There is, however, no consistent approach in the lower courts on the question of who is a minister. The Seventh Circuit has adopted perhaps the broadest reading of the exception, concluding that it bars any claim by any employee, religious or lay, who is responsible for conveying the message of [the] organization [27] or whose duties had a significant religious dimension. [28] Thus, the Seventh Circuit has ruled that a press secretary to a Catholic Diocese whose responsibilities included translating materials into Spanish and drafting press releases and correspondence was functionally a minister, under the reasoning that she was involved in communicating the church s religious message to the public even though she was not ordained, required to be a Catholic, or empowered to make any decisions about religious doctrine.[29] The Fourth and Fifth Circuits have focused on whether the plaintiff religious or lay engaged in ac-

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[25] *Rayburn*, 772 F.2d at 1169; *see also Alicea-Hernandez*, 320 F.3d at 703; *Catholic Univ.*, 83 F.3d at 465.

[26] *Roman Catholic Diocese*, 213 F.3d at 801.

[27] *See Alicea-Hernandez*, 320 F.3d at 704.

[28] Pet. App. 8a.

[29] *See Alicea-Hernandez*, 320 F.3d at 703.

tivities traditionally considered ecclesiastical or religious, [30] and whether an employee s primary duties consist of teaching, spreading the faith, church governance, supervision of a religious order, or supervision or participation in religious ritual and worship. [31] The D.C. Circuit has also ruled that it is immaterial whether the plaintiff was ordained, and that the crucial question is whether the role performed ... is vital to the spiritual and pastoral mission of the church, holding that a university professor of canon law, though not a priest (and indeed forbidden from becoming a priest because of her sex), was nonetheless a minister. [32]

A quite different approach is reflected in the decisions of the Second, Third, Eighth, and Ninth Circuits. Those courts have allowed discrimination complaints to go forward even when the plaintiffs duties had significant religious components, and in some cases even when the plaintiffs were ministers by any definition.[33] Thus, the Second Circuit

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[30] *Starkman*, 198 F.3d at 176 (quotation omitted); *see also Roman Catholic Diocese*, 213 F.3d at 801.

[31] *Rayburn*, 772 F.2d at 1169. The Fourth Circuit s case law is not entirely consistent. It has, for example, allowed a teacher at a religiously-affiliated school to state a claim under the Equal Pay Act of 1963, 29 U.S.C. § 206(d), even though classes at the school were taught from a pervasively religious perspective, and teachers led students in prayer and were required to subscribe to the school s statement of faith as a condition of employment. *See Dole* v. *Shenandoah Baptist Church*, 899 F.2d 1389, 1395-1396 (4th Cir. 1990).

[32] *Catholic Univ.*, 83 F.3d at 464-465. *But see id.* at 471-476 (Henderson, J., concurring) (questioning whether the ministerial exception should apply where the institution offers no religious reason for the adverse employment decision).

[33] Both the Eighth and Ninth Circuits have, however, applied the exception in some cases where the claimant was a member of the clergy. *Werft*, 377 F.3d at 1100, 1104 (applying the exception to a minister s claim that he was discriminated against on the basis of his disability); *Scharon*, 929 F.2d at 362-363 (applying the exception to a priest s age and sex discrimination claims). The Second Circuit has not yet addressed whether adjudication of a church s decision to hire or fire a member of the clergy would necessarily present an impermissible intrusion on the church's First Amendment rights. *See Hankins*, 441 F.3d at 99 (remanding a suit

ruled that the Constitution did not bar an ADEA action brought by a teacher in a Catholic parochial school whose duties included leading his students in prayers and taking them to Mass, even though the school expressly contended that the teacher had been fired because he had failed to fulfill the spiritual mission of the school.[34] As the court explained, the constitutional prohibition against judicial examination of the religious basis of a church s decision to hire a minister is of no moment in the ADEA context because the ADEA applies only where plaintiffs establish that age-discriminatory animus was the but for cause of the challenged employment action. [35] Similarly, the Third Circuit allowed a teacher in a religious school to bring an ADEA action, even though the school alleged that she had been fired for conduct violating church doctrine.[36]

The Eighth Circuit found no constitutional bar to an ADEA action brought by the lay administrator of a synagogue, who, although not a member of the clergy and not empowered to make doctrinal decisions, was the initial point of contact with prospective [synagogue] members, and [was] required to promote a positive image of the Temple among its members and to the general community. [37] As the Eighth Circuit stated, the mere fact that a lay employee has religious duties does not shield a religious employer

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brought by a member of the clergy for analysis under RFRA). A recent decision of the Third Circuit would have extended *Geary* and would have allowed a chaplain of a religiously affiliated university to bring a sex discrimination claim against her former employer. *See Petruska* v. *Gannon Univ.*, 448 F.3d 615, *vacated for panel rehearing*, No. 05-1222, 2006 U.S. App. LEXIS 15088 (3d Cir. June 20, 2006). That decision was vacated for panel rehearing because the authoring judge, Judge Becker, died before the decision was issued and because circumstances arose that indicated that another judge on the panel might have been subject to recusal.

[34] *DeMarco*, 4 F.3d at 168, 172.

[35] *Id.* at 172.

[36] *See Geary*, 7 F.3d at 326-329.

[37] *Weissman*, 38 F.3d at 1040.

from the ADEA. [38] The conflict between that decision and the decisions of the Seventh Circuit is particularly striking. The temple administrator s role in promoting the message and work of the synagogue was quite similar to the function of the press secretary to the Catholic Diocese who the Seventh Circuit concluded *was* functionally a minister and was therefore barred from bringing an employment discrimination suit against the church for which she worked. Each was a layperson; neither was required to be an adherent of the religion of the employer; both were involved in promoting the image and message of the religious institution for which they worked. Nonetheless, the two circuits reached opposite conclusions in the two cases about whether the discrimination suit could go forward.

The decisions of the Ninth Circuit also stand in contrast to the decision below. The Ninth Circuit has held in decisions that have generated sharp disagreements within that circuit that even *ministers* may bring employment discrimination suits in some circumstances. That court has held, for example, that an associate pastor could sue for sexual harassment under a hostile work-environment theory and for retaliatory harassment after she filed a complaint with the EEOC in the face of dissenting opinions arguing that the decision conflicted with the case law of several other circuits.[39] The court has also held that a Jesuit novitiate could sue under Title VII under the theory that sexual harassment caused his constructive discharge from his seminary and from the Jesuit order.[40] Although the Ninth Cir-

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[38] *Id.* at 1045.

[39] *See Elvig*, 375 F.3d at 955-965. *But see id.* at 975-979 (Trott, J., dissenting) (arguing that decision conflicted with decisions of other circuit); *Elvig*, 397 F.3d at 801-803 (Kleinfeld, O Scannlain, Callahan, and Bea, JJ., dissenting from rehearing en banc) (same).

[40] *See Bollard*, 196 F.3d at 944-947. The court noted that it was critical that the plaintiff was constructively discharged rather than actually discharged, *id.* at 947, although the Ninth Circuit later found that the ministerial exception barred a plaintiff s claim that he was forced to resign

cuit appears not to allow ministers to base employment discrimination claims on actual hiring and firing,[41] it is clear that in the Ninth Circuit even ministers may not fall within the ministerial exception, whereas in the Seventh Circuit the category of ministers includes press secretaries and organists. Review by this Court is needed to clarify which employees of religious organizations are to be considered ministers for purposes of the exception.

3. A related disagreement among the circuits concerns whether permitting a discrimination suit against a religious organization to go forward turns on whether the employer has asserted or is likely to assert a religious reason for the challenged employment action. The approach of the Fourth, Fifth, Seventh, and D.C. Circuits, as discussed above, is that no discrimination claim may be made by a minister at all, regardless of the actual or asserted reason for the adverse employment action. In the view of those courts, the constitutional protection applies to the action, not the reason for the action.[42] Thus, those courts have dismissed discrimination cases even when no religious-based justification for the action appeared in the record (as occurred in this case).

The Second and Third Circuits, by contrast, have reasoned that the Constitution prohibits scrutiny only of the *religious* reasons for the actions of religious organizations, and so courts may decide whether a plaintiff s termination in fact resulted from a prohibited secular purpose rather than a religious one. In those circuits, if a defendant offers a religious justification for its action, the plaintiff may not challenge that justification as false under the applicable religious doctrine, but the plaintiff may nonetheless attempt to

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because the church refused to accommodate his disability, *Werft*, 377 F.3d at 1100, 1104.

[41] *See Elvig*, 375 F.3d at 961.

[42] *See, e.g., Roman Catholic Diocese*, 213 F.3d at 801; *Rayburn*, 772 F.2d at 1169; *Alicea-Hernandez*, 320 F.3d at 703.

show that that proffered justification was not, in fact, the real reason for the adverse personnel action. As the Second Circuit has explained, because the inquiry is directed toward determining whether the articulated purpose is the actual purpose for the challenged employment-related action[,] ... in those cases where a defendant proffers a religious purpose for its allegedly discriminatory employment action, a plaintiff will usually be able to challenge as pretextual the employer s justification without calling into question the value or truthfulness of religious doctrine. [43] In those circumstances, [a] fact-finder will necessarily have to presume that an asserted religious motive by the employer accurately reflects the religious doctrine on which the employer relies, but could nonetheless conclude, based on the demonstrated facts, that that motive was not what animated the challenged employment action.[44]

The Third Circuit has adopted much the same rule. As that court has explained, even when an employer asserts a religious justification for an adverse employment action, a plaintiff may seek to prove that the action in fact reflected prohibited discrimination. So long as [the plaintiff] does not challenge the validity of the religious doctrine on which the employer relies, the court may determine whether the religious reason ... actually motivated the dismissal of the plaintiff.[45] The plaintiff may attempt to show that the proffered religious justification was a pretext for the actual reason for the dismissal, and as long as the pretext inquiry neither traverses questions of the validity of religious beliefs nor forces a court to choose between parties competing religious visions, that inquiry does not present a significant risk of entanglement. [46]

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[43] *See DeMarco*, 4 F.3d at 171.

[44] *See id.*

[45] *See Geary*, 7 F.3d at 329.

[46] *See id.* at 330. The Third Circuit reaffirmed this approach in its recent decision in *Petruska*, which has been vacated for panel rehearing.

The Second and Third Circuits express approval of pretext inquiries in age discrimination suits against religious employers stands in sharp contrast to the decision below. In this case, the Seventh Circuit speculated that, if the case proceeded past the pleading stage, the Diocese *might* offer a religious justification for its termination of petitioner (namely, disagreement over the suitability of particular music for Easter Mass), and in response petitioner *might* ask the court to conclude that this justification was pretextual because the music that petitioner desired to have played at Easter Mass was actually more suitable than the music that the church hierarchy desired to have played.[47]

In fact, petitioner has not alleged that he and the Diocese had any substantive disagreement over music for Easter Mass, and the Diocese has not argued that petitioner was fired because of any such disagreement. But even putting those points aside, the decisions of the Second and Third Circuit show why, even if this case were to proceed to discovery and trial, there need never be any occasion for any court to decide the religious and metaphysical issue of which music is more suitable for Easter Mass. If the Diocese argues in this case that petitioner was fired because of a disagreement over music for Easter Mass, the court may not question the Diocese's assertion that its choice of music was

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As the *Petruska* panel explained, the defendant had not proffered a religious justification for its termination of the plaintiff, and the court could not conclude on a motion to dismiss that the suit would necessarily require examination of religious belief, religious doctrine, or internal church regulation. 448 F.3d at 632. The mere fact that the religious organization would be likely to defend its employment action on grounds related to church needs rooted in church doctrine also did not require a court to prophylactically disregard the command of Congress and dismiss the case. *Id.* at 634 (quotation omitted). Even if such an issue arose in the course of the suit, the court said, it might be possible for the litigation to proceed. *Id.* at 632-633. If the church asserted that the employment decision was based on religious beliefs, the employee would still be able to claim that that was not the basis for the decision, although she would not be able to challenge the religious rationale itself. *Id.*

[47] *See* Pet. App. 6a-7a.

more suitable for that religious event than petitioner s. What the court *may* conclude, based on the type of a pretext inquiry with which federal courts hearing discrimination cases are very familiar, is that this religious explanation is simply a *post hoc* rationalization offered to justify what, in fact, was a decision based on age. A court might reach that conclusion if, for example, the Diocese had never offered a religious reason for petitioner s termination before the lawsuit was commenced, or if there was no evidence that the Church hierarchy had ever expressed its dissatisfaction with petitioner s choice of music before his termination, or if members of the Church hierarchy had made inconsistent statements about the reasons for petitioner s termination. Each of those circumstances would provide a neutral, secular reason for concluding that the supposed religious justification was a pretext, without requiring the court to decide whose choice of music provided a more suitable religious experience for Easter Mass.

In short, if this case had been brought in the Second or Third Circuits, the Diocese s motion to dismiss would not have been well-taken, and petitioner would have been allowed to proceed to discovery in his effort to prove that the Diocese fired him because of his age. The scope of the court s adjudication of his discrimination complaint might have been circumscribed in some respects by constitutional concerns namely, the court could not second-guess the Diocese s assertion, were it ever made, that its choice of music was better for Easter Mass than petitioner s choice but that limited constraint would not have prevented petitioner from attempting to prove, through several other means, that his termination violated the ADEA.

C. Lower Courts Also Disagree On Whether The Ministerial Exception Has Been Superseded By The Religious Freedom Restoration Act

This case also provides the Court with the opportunity to resolve a circuit split concerning the relationship between the ministerial exception and the Religious Freedom Restoration Act (RFRA), 42 U.S.C. §§ 2000bb *et seq.* The ministe-

rial exception, as discussed above, is not based on the text of federal anti-discrimination statutes, but rather reflects the courts determination that application of those laws in particular cases could run afoul of the First Amendment. One court of appeals has now concluded that Congress, in RFRA, has provided explicit direction to the courts about the permissible application of federal employment discrimination law to religious organizations, and that this explicit direction has superseded the judicially-crafted ministerial exception.

In *Hankins* v. *Lyght*, 441 F.3d 96 (2d Cir. 2006), the Second Circuit recently held that RFRA superseded the ministerial exception to employment discrimination laws. The court concluded that RFRA must be deemed the full expression of Congress s intent with regard to the religion-related issues before us and displace earlier judge-made doctrines that might have been used to ameliorate the ADEA s impact on religious organizations and activities. [48] Although RFRA applies by its terms only to governmental action, the court concluded that RFRA applies to a discrimination lawsuit between private parties because the substantive prohibitions of the ADEA do not change depending on whether the suit is brought by the EEOC, a government agency to which RFRA clearly applies, or private plaintiffs.[49]

The Seventh Circuit rejected this ruling and concluded that RFRA has not superseded the ministerial exception.[50]

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[48] 441 F.3d at 102. The court relied on *City of Milwaukee* v. *Illinois*, 451 U.S. 304 (1981), suggesting that it viewed the enactment of RFRA like the enactment of the Clean Water Act, which superseded the pre-existing federal common law of interstate water pollution that had been crafted by the courts without guidance from Congress. *See Hankins*, 441 F.3d at 102-103 (quoting *City of Milwaukee*, 451 U.S. at 314).

[49] *See Hankins*, 441 F.3d at 103.

[50] Pet. App. 10a-11a. This Court may address the relationship between RFRA and the ministerial exception even though neither party raised that issue in the court of appeals. This Court s traditional rule is that it may review an issue not pressed so long as it has been passed upon in the court of appeals. *United States* v. *Williams*, 504 U.S. 36, 41-42 (1992); *see also Virginia Bankshares, Inc.* v. *Sandberg*, 501 U.S. 1083,

The court noted that the Second Circuit s decision would if sound invalidate the many decisions in this and other circuits recognizing the ministerial exception. [51] But the court found the Second Circuit s ruling unsound, concluding that RFRA is applicable only in suits to which the government is a party. [52] The court also stated that replacement of the ministerial exception with RFRA could raise a serious constitutional issue . . . if Congress . . . required federal courts to decide religious questions. [53]

Whether a case is governed by the ministerial exception, especially as broadly construed by the Seventh Circuit, or by RFRA, may well be outcome-determinative. The Seventh Circuit stated, for example, that RFRA s protection for religious activity may well be less expansive than the protection offered by the judicially-crafted ministerial exception because RFRA requires the religious organization to show that the application of the federal law imposes a substantial burden on its religious activity.[54]

That showing cannot be made in this case, at least at this stage, where the case has not advanced past the initial pleading. This case was decided on a motion to dismiss, and the Diocese has never argued that plaintiff was terminated for a religious reason. The complaint provides no basis for the Diocese to argue that application of the ADEA to provide a remedy to a lay employee who was terminated because of age-based animus would substantially burden the

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1099 n.8 (1991). In this case, the court of appeals squarely addressed and decided whether RFRA has superseded the ministerial exception.

[51] Pet. App. 10a.

[52] *Id.*

[53] *Id.* at 11a.

[54] *See id.* at 10a; 42 U.S.C. § 2000bb-1(a); *see also, e.g., Worldwide Church of God* v. *Philadelphia Church of God, Inc.*, 227 F.3d 1110, 1120-1121 (9th Cir. 2000) (declining to hold private copyright action barred by RFRA, in part because the church failed to demonstrate that the copyright laws subject it to a substantial burden in the exercise of its religion).

Diocese s religious activity. Accordingly, if RFRA were to govern here rather than the ministerial exception, the Seventh Circuit s decision affirming the dismissal of the complaint would have to be reversed and the case remanded to allow petitioner to do what he has attempted to do all along: prove that he was fired because of his age.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

STEPHEN J. THOMAS
JACKSON THOMAS LLP
416 Main Street
Suite 717
Peoria, IL 61602
(309) 637-8888

PAUL R.Q. WOLFSON
COUNSEL OF RECORD
KELLEY BROOKE SNYDER
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Avenue NW
Washington, DC 20006
(202) 663-6000

JUNE 2006

APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 04-4219

RICHARD TOMIC,
Plaintiff-Appellant,

v.

CATHOLIC DIOCESE OF PEORIA,
Defendant-Appellee.

Appeal from the United States District Court
for the Central District of Illinois.
No. 04 C 1184—Michael M. Mihm, *Judge.*

ARGUED DECEMBER 5, 2005—DECIDED APRIL 4, 2006

Before POSNER, KANNE, and SYKES, *Circuit Judges.*

POSNER, *Circuit Judge.* This age-discrimination suit by the former music director and organist of a Catholic diocese, dismissed on a motion to dismiss, requires us to consider the scope of the rule that federal courts may not exercise jurisdiction over the internal affairs of religious associations.

Richard Tomic was employed as the music director and organist both of a Roman Catholic church in Peoria (St. Mary's Cathedral) and of the Peoria diocese itself. The job description for the diocesan position required him "to assist the Office of Divine Worship in preparing and celebrating various diocesan liturgies" and "in planning and celebrating liturgical events as requested." The description of his church job required him to play the organ for masses and other events, including weddings and funerals, and, in his

capacity as music director, to "prepare music for all Parish masses and liturgies ... in consultation with the Rector/Pastor where necessary," as well as to recruit, train, direct, and rehearse the members of the chorus.

A dispute with the bishop's assistant concerning the scheduling of Easter music culminated in Tomic's dismissal from both positions; he was 50 years old and was replaced by a much younger person. The diocesan employment handbook describes the diocese as "an Equal Opportunity Employer" that does not discriminate on account of race, sex, etc.—including age—with certain exceptions (such as that employees "shall conform to the moral standards of the Catholic faith") that are not claimed to be applicable to Tomic. In dismissing the suit, the district judge did not explore the dispute between Tomic and the bishop's assistant or decide whether age had played any role in Tomic's dismissal.

Federal courts are secular agencies. They therefore do not exercise jurisdiction over the internal affairs of religious organizations. E.g., *Jones v. Wolf*, 443 U.S. 595, 602 (1979); *Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 709-10, 713-15 (1976); *Presbyterian Church in the United States v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U.S. 440, 449-50 (1969); *Commack Self-Service Kosher Meats, Inc. v. Weiss*, 294 F.3d 415, 427-28 (2d Cir. 2002); *Dixon v. Edwards*, 290 F.3d 699, 714-15 (4th Cir. 2002); Note, "Judicial Intervention in Disputes over the Use of Church Property," 75 *Harv. L. Rev.* 1142 (1962). When Article III of the Constitution created the federal judicial power, England had, as part of its established church, ecclesiastical courts (with curious names, such as the "Court of Arches" and the "Court of Peculiars"). 3 William Blackstone, *Commentaries on the Laws of England*, ch. 5 (1768). Since the United States was not to have a national church, the federal judicial power was not envisaged as extending to the resolution of ecclesiastical controversies. In contrasting our situation with that of England, the Supreme Court remarked:

> In this country the full and free right to entertain any religious belief, to practice any religious principle, and to teach any religious doctrine which does not violate the laws of morality and property, and which does not infringe personal rights, is conceded to all. The law knows no heresy, and is committed to the support of no dogma, the establishment of no sect. The right to organize voluntary religious associations to assist in the expression and dissemination of any religious doctrine, and to create tribunals for the decision of controverted questions of faith within the association, and for the ecclesiastical government of all the individual members, congregations, and officers within the general association, is unquestioned. All who unite themselves to such a body do so with an implied consent to this government, and are bound to submit to it. But it would be a vain consent and would lead to the total subversion of such religious bodies, if any one aggrieved by one of their decisions could appeal to the secular courts and have them reversed. It is of the essence of these religious unions, and of their right to establish tribunals for the decision of questions arising among themselves, that those decisions should be binding in all cases of ecclesiastical cognizance, subject only to such appeals as the organism itself provides for.

Watson v. Jones, 80 U.S. (13 Wall.) 679, 728-29 (1871); see also Note, *supra*, at 1155-56.

A suit to remove a priest on the ground that he is a heretic, or to reinstate a parishioner who has been excommunicated, thus has never been justiciable in the federal courts. E.g., *Serbian Eastern Orthodox Diocese v. Milivojevich*, *supra*, 426 U.S. at 698; *Bouldin v. Alexander*, 82 U.S. (15 Wall.) 131, 139-40 (1872); cf. *Montano v. Hedgepeth*, 120 F.3d 844, 850-51 (8th Cir. 1997). Even if the suit does not involve an issue of religious doctrine, but concerns merely the governance structure of the church, the courts will not

assume jurisdiction if doing so would interfere with the church's management. *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94, 116 (1952); *Young v. Northern Illinois Conference of United Methodist Church*, 21 F.3d 184, 187 (7th Cir. 1994); *Combs v. Central Texas Annual Conference of United Methodist Church*, 173 F.3d 343, 350 (5th Cir. 1999); *EEOC v. Catholic University of America*, 83 F.3d 455, 462-63 (D.C. Cir. 1996). These cases "affirm the fundamental right of churches to 'decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine.' " *Id.* at 462, citing *Kedroff*; see also *Gellington v. Christian Methodist Episcopal Church, Inc.*, 203 F.3d 1299, 1304 (11th Cir. 2000). Also pertinent is *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979). The issue in that case was whether the National Labor Relations Act applied to lay teachers in Catholic schools. The Court held not, because "the resolution of [unfair labor] charges by the [National Labor Relations Board], in many instances, will necessarily involve inquiry into the good faith of the position asserted by the clergy-administrators and its relationship to the school's religious mission. It is not only the conclusions that may be reached by the Board which may impinge on rights guaranteed by the Religion Clauses, but also the very process of inquiry leading to findings and conclusions." *Id.* at 502.

Thus "the First Amendment concerns [with assuming jurisdiction in ecclesiastical cases] are two-fold. The first concern is that secular authorities would be involved in evaluating or interpreting religious doctrine. The second quite independent concern is that in investigating employment discrimination claims by ministers against their church, secular authorities would necessarily intrude into church governance in a manner that would be inherently coercive, even if the alleged discrimination were purely non-doctrinal." *Combs v. Central Texas Annual Conference of United Methodist Church, supra*, 173 F.3d at 350 (citations omitted). This second aspect of the internal-affairs doctrine is called the "ministerial exception" to the exercise of federal

jurisdiction. E.g., *Alicea-Hernandez v. Catholic Bishop of Chicago*, 320 F.3d 698, 702-03 (7th Cir. 2003).

Both aspects govern decision even when—in fact most commonly when—the complaint is not based on and does not refer to religious doctrine or church management (as in most Title VII and other employment-discrimination suits) but it is apparent that a controversy over either may erupt in the course of adjudication. E.g., *id.*; *EEOC v. Roman Catholic Diocese of Raleigh*, 213 F.3d 795, 801 (4th Cir. 2000).

The ministerial exception, and the hands-off approach more generally, do not place the internal affairs of religious organizations wholly beyond secular jurisdiction. If a local congregation of a hierarchical sect seized the local church, changed the locks, and declared itself an independent religious organization, a court would, upon suit by the hierarchy, enjoin the seizure. *Jones v. Wolf*, *supra*, 443 U.S. at 602-03; *Watson v. Jones*, *supra*, 80 U.S. (13 Wall.) at 726-29; *Maryland & Virginia Eldership of Churches of God v. Church of God at Sharpsburg, Inc.*, 396 U.S. 367, 367-68 (1970) (per curiam); *Church of God in Christ, Inc. v. Graham*, 54 F.3d 522, 525-26 (8th Cir. 1995); cf. *Presbyterian Church in the United States v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*, *supra*, 393 U.S. at 449-50. Or if to avoid having to pay the minimum wage to its janitor a church designated all its employees "ministers," the court would treat the designation as a subterfuge, see *Dole v. Shenandoah Baptist Church*, 899 F.2d 1389, 1396-97 (4th Cir. 1990); cf. *EEOC v. Roman Catholic Diocese of Raleigh*, *supra*, 213 F.3d at 801; *Bollard v. California Province of the Society of Jesus*, 196 F.3d 940, 947 (9th Cir. 1999), just as the Internal Revenue Service denies tax exemptions to religious associations that are not bona fide. *Living Faith, Inc. v. Commissioner*, 950 F.2d 365, 372-73 (7th Cir. 1991); *United States v. Jeffries*, 854 F.2d 254, 257 (7th Cir. 1988); *Spiritual Outreach Society v. Commissioner*, 927 F.2d 335, 339 (8th Cir. 1991).

These examples show that federal courts cannot always avoid taking a stand on a religious question. In the seizure

case, there might be a dispute over whether, under the internal law of the sect in question, local church property was owned by the congregation or by the sect. The court would have to answer the question in order to determine whether to issue the injunction; and though the tendency of the courts is simply to accept whatever answer the highest church authority gives to the question of ownership, at a minimum the court must determine what is that highest authority. In the janitor's case, the court would have to determine whether under the actual law of the church in question (and not as a subterfuge) janitors really were ministers. The internal-affairs exception is limited in other ways as well. A church could not subject its clergy to corporal punishment or require them to commit criminal acts. E.g., *Employment Division v. Smith*, 494 U.S. 872 (1990); *United States v. Indianapolis Baptist Temple*, 224 F.3d 627, 629 (7th Cir. 2000). But it would not be constrained in its dealings with them by employment laws that would interfere with the church's internal management, including antidiscrimination laws. E.g., *Alicea-Hernandez v. Catholic Bishop of Chicago*, *supra*, 320 F.3d at 702-04 (Title VII); *EEOC v. Roman Catholic Diocese of Raleigh*, *supra*, 213 F.3d at 800-01 (ditto); *Minker v. Baltimore Annual Conference of United Methodist Church*, 894 F.2d 1354, 1356-57 (D.C. Cir. 1990) (ADEA).

It might seem that unless a church had a doctrine placing limitations of age, race, ethnic origin, disability, or sex on ministers, the application of laws forbidding employment discrimination would not involve the court in theological controversy. But this is not correct, because the church would be likely to defend its employment action on grounds related to church needs rooted in church doctrine. See *Scharon v. St. Luke's Episcopal Presbyterian Hospitals*, 929 F.2d 360, 363 (8th Cir. 1991). The reference in the complaint in this case to the dispute between Tomic and the bishop's assistant suggests that if the suit were permitted to go forward, the diocese would argue that he was dismissed for a religious reason—his opinion concerning the suitability of particular music for Easter services—and the argument could propel

the court into a controversy, quintessentially religious, over what is suitable music for Easter services. Tomic would argue that the church's criticism of his musical choices was a pretext for firing him, that the real reason was his age. The church would rebut with evidence of what the liturgically proper music is for an Easter Mass and Tomic might in turn dispute the church's claim. The court would be asked to resolve a theological dispute. *DeMarco v. Holy Cross High School*, 4 F.3d 166, 171 (2d Cir. 1993).

This assumes, however, that as organist and music director, Tomic, unlike the janitor of St. Mary's Cathedral, really did have religious duties. See *id.* at 171-72. So far as his role as organist is concerned, his lawyer says that all Tomic did was play music. But there is no one way to play music. If Tomic played the organ with a rock and roll beat, or played excerpts from *Jesus Christ Superstar*, at an Easter Mass he would be altering the religious experience of the parishioners. Among his duties as music director was that of selecting the music to be played at the various masses. That duty required him to make a discretionary religious judgment because the Catholic Church does not have rules specifying what piece of music is to be played at each type of mass. Raymond F. Glover, "Liturgical Music: Its Forms and Functions," in *Liturgy and Music: Lifetime Learning* 231, 247-48 (Robin A. Leaver & Joyce Ann Zimmerman, eds. 1998).

At argument Tomic's lawyer astonished us by arguing that music has in itself no religious significance—its only religious significance is in its words. The implication is that it is a matter of indifference to the Church and its flock whether the words of the Gospel are set to Handel's *Messiah* or to "Three Blind Mice." That obviously is false. The religious music played at a wedding is not necessarily suitable for a funeral; and religious music written for Christmas is not necessarily suitable for Easter. Even Mozart had to struggle over what was suitable church music with his first patron, Archbishop Colloredo, whom the Mozart family called the "arch-booby." "[M]usic is a vital means of express-

ing and celebrating those beliefs which a religious community holds most sacred. Music is an integral part of many different religious traditions," including the Catholic tradition. *EEOC v. Roman Catholic Diocese of Raleigh*, *supra*, 213 F.3d 795, 802-03; see also *Starkman v. Evans*, 198 F.3d 173, 176-77 (5th Cir. 1999). Like the plaintiff in the *Starkman* case, Tomic "performed tasks that were 'traditionally ecclesiastical or religious.'" *Id.* at 177.

The rector or bishop could override Tomic's choices of what music to play. But it is easy to see how disagreement with his choices could convince the ecclesiastical authorities that they would be better off with someone else in the job. If as in this case the music director is at least 40 years old and therefore within the class protected by the Age Discrimination in Employment Act, the ability of the church and the diocese to remove him will be inhibited unless the ministerial exception is applicable. Since, as we have just seen, Tomic's duties, unlike those, say, of the person who tunes the organ in St. Mary's Cathedral, had a significant religious dimension, Tomic forfeited his rights under the Act.

DeMarco v. Holy Cross High School, *supra*, is a case just across the line from this one. The plaintiff in an age-discrimination suit, DeMarco was a math teacher at a Catholic school. He had minor religious duties—leading the students in prayers and taking them to Mass—but the court thought it unlikely that a trial of his age-discrimination claim would entail an examination of religious doctrine. The key passage in the court's opinion is the following: "the references to Holy Cross's religious mission are linked to two very specific allegations: that DeMarco failed to attend Mass and to lead his students in prayers. Given that the religious duties that DeMarco allegedly failed to carry out are easily isolated and defined, we are confident that the able district judge will be able to focus the trial upon whether DeMarco was fired because of his age or because of failure to perform religious duties, and that this can be done without putting into issue the validity or truthfulness of Catholic religious teaching." 4 F.3d at 172. DeMarco either did or did not lead

his students in prayer and attend mass. These were simple questions of fact, no different from whether he correctly added 2 plus 2, and could be answered without reference to church doctrine. That is not true with respect to the wisdom or propriety of Tomic's choice of music to play at an Easter Mass.

The court in *DeMarco* distinguished the Supreme Court's decision in *Catholic Bishop* on the ground that the National Labor Relations Act imposes more comprehensive duties on employers than the age-discrimination law. 4 F.3d at 169. Fair enough; but *DeMarco* also distinguished cases in which the employee is a member of the clergy, *id.* at 171-72; and the music director of a Catholic church and diocese is more like a clergyman than a math teacher. Also distinguishable is *Tony & Susan Alamo Foundation v. Secretary of Labor*, 471 U.S. 290, 303-06 (1985), a replay of *Catholic Bishop* except that in *Alamo* the employees were not parochial-school teachers but instead the employees of commercial enterprises owned by the church. The Court could not see how even the regulation of the enterprises' labor practices by the Fair Labor Standards Act could inject a reviewing court into a religious dispute.

But we must consider whether it makes a difference that the diocese represents itself to be an "equal opportunity" employer, specifically with respect to age. Tomic argues that this representation in the employee handbook, though it disclaims creating a contractual obligation, should estop the diocese to deny that it is subject to the age-discrimination law. Now it is very unlikely that the representation should be interpreted to embrace religious functionaries, such as the music director. Among the forms of discrimination that the handbook forbids is discrimination on grounds of sex, though women of course cannot be Catholic priests. But in any event the ministerial exception, like the rest of the internal-affairs doctrine, is not subject to waiver or estoppel. *Minker v. Baltimore Annual Conference of United Methodist Church*, *supra*, 894 F.2d at 1356-57. A federal court will not allow itself to get dragged into a reli-

gious controversy even if a religious organization wants it dragged in. There is an analogy to the refusal of the courts to honor certain choice of law provisions in contracts. Generally, such a provision is honored. If a contract between citizens of Illinois specifies that the law of New York shall govern any dispute arising from the contract, a court in Illinois will apply that law. But as we said in *Lloyd v. Loeffler*, 694 F.2d 489, 495 (7th Cir. 1982), if the parties stipulated that their dispute would be governed by the Code of Hammurabi the court would refuse to honor the stipulation. Judges have an interest independent of party preference for not being asked to decide an issue that they cannot resolve intelligently. Americans would, moreover, be deeply offended at the thought of their secular courts taking on the additional role of religious courts, as if the United States were a theocracy.

After the oral argument in this case, the Second Circuit held (over dissent) that the Religious Freedom Restoration Act, 42 U.S.C. §§ 2000bb *et seq.* (which in the wake of *City of Boerne v. Flores*, 521 U.S. 507 (1997), is limited to federal action, *O'Bryan v. Bureau of Prisons*, 349 F.3d 399, 401 (7th Cir. 2003)) amended the ADEA to wipe out the ministerial exception and substitute RFRA's standard, which requires deciding whether a particular law imposes a substantial burden on religious activity. *Hankins v. Lyght*, 438 F.3d 163, 169 (2d Cir. 2006). The decision would if sound invalidate the many decisions in this and other circuits recognizing the ministerial exception to federal employment discrimination law. The decision is unsound. RFRA is applicable only to suits to which the government is a party. See 42 U.S.C. §§ 2000bb-l(b), (c); *Worldwide Church of God v. Philadelphia Church of God, Inc.*, 227 F.3d 1110, 1120-21 (9th Cir. 2000); *Sutton v. Providence St. Joseph Medical Center*, 192 F.3d 826, 834-35 (9th Cir. 1999). "A person whose religious exercise has been burdened in violation of this section may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against a government." 42 U.S.C. § 2000bb-l(c).

It is hardly to be imagined, moreover, that in seeking to broaden the protection of religious rights, Congress, dropping nary a hint, wiped out a long-established doctrine that gives greater protection to religious autonomy than RFRA does. Indeed a serious constitutional issue would be presented if Congress by stripping away the ministerial exception required federal courts to decide religious questions. The exception is based on the establishment and free-exercise clauses of the First Amendment, see, e.g., *Combs v. Central Texas Annual Conference of United Methodist Church*, *supra*, 173 F.3d at 350; *Rayburn v. General Conference of Seventh-Day Adventists*, 772 F.2d 1164, 1169 (4th Cir. 1985), which place tight limits on governmental authority to regulate religion. In the *Catholic Bishop* case, the majority adopted a strained interpretation of the National Labor Relations Act in order to avoid confronting this constitutional issue. The dissent thought the strain too great, but did not deny the existence of such an issue, or intimate a view on how it should be resolved. 440 U.S. at 517-18.

It is no surprise that the appellant in *Hankins* did not even argue RFRA; nor does Tomic.

AFFIRMED.

A true Copy:

Teste:

_____

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX B

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS

Case No. 04-1184

RICHARD TOMIC,
Plaintiff,

v.

CATHOLIC DIOCESE OF PEORIA,
a Religious Corporation
Defendant.

[STAMP: E-FILED
Wednesday, 17 November, 2004 01:24:32 PM
Clerk, U.S. District Court, ILCD]

ORDER

This matter is now before the Court on Defendant's Motion to Dismiss. For the reasons set forth below, the Motion [#4] is GRANTED.

JURISDICTION

The Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1331, as the claims asserted arise pursuant to Title VII, 42 U.S.C. 2000e, and the Age Discrimination in Employment Act of 1967 (the "ADEA"), 29 U.S.C. § 621.

BACKGROUND[1]

Plaintiff, Richard Tomic ("Tomic"), was hired by Defendant, Catholic Diocese of Peoria (the "Diocese"), in March 1996 as the Director of Music and Organist for St. Mary's Cathedral. In July 1998, he assumed the additional role of the Director of Music and Organist for the Diocese. Tomic held both of these positions until his discharge on March 25, 2003.

From March 20, 2003, through March 25, 2003, Tomic had several discussions with the Bishop's assistant, Rev. Jason Gray regarding the scheduling of choir practices and music for the coming Holy Week and Easter. Tomic was concerned that the scheduling proposed by Rev. Gray would have a detrimental effect on the music scheduled for Easter week. During these discussions, Tomic was informed that the Diocese was hiring a new organist and choir director to "assist" him. On March 25, 2003, Tomic was abruptly terminated with no warning or opportunity to appeal and was never given a reason for his termination. At that time, he was 52 years old.

On June 11, 2004, Tomic commenced this litigation. In his Complaint, he makes essentially three claims: (1) he was the victim of unlawful age discrimination in violation of the ADEA and Title VII; (2) the Diocese breached the covenant of good faith and fair dealing implicit in his employment contract; and (3) employees of the Diocese are guilty of slander per se because they have made false statements that have interfered with his business or profession.

Defendant has now moved to dismiss the Complaint pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure. Tomic has filed his response, and this Order follows.

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[1] Unless otherwise noted, the background is taken from allegations in Plaintiff's Complaint and presumed to be true for purposes of resolving this Motion.

DISCUSSION

A complaint should not be dismissed unless it appears from the pleadings that the plaintiff could prove no set of facts in support of his claim which would entitle her to relief. See *Conley v. Gibson*, 355 U.S. 41 (1957); *Gould v. Artisoft, Inc.*, 1 F.3d 544, 548 (7th Cir. 1993). Rather, a complaint should be construed broadly and liberally in conformity with the mandate in Federal Rules of Civil Procedure 8(f).

For purposes of a motion to dismiss, the complaint is construed in the light most favorable to the plaintiff; its well-pleaded factual allegations are taken as true, and all reasonably-drawn inferences are drawn in favor of the plaintiff. See *Albright v. Oliver*, 510 U.S. 266, 268 (1994); *Hishon v. King & Spalding*, 467 U.S. 69 (1984); *Lanigan v. Village of East Hazel Crest*, 110 F.3d 467 (7th Cir. 1997); *M.C.M. Partners, Inc. v. Andrews-Bartlett & Assoc., Inc.* 62 F.3d 967, 969 (7th Cir. 1995); *Early v. Bankers Life & Cas. Co.*, 959 F.2d 75 (7th Cir. 1992).

I. *Subject Matter Jurisdiction*

The Diocese first argues that the Complaint should be dismissed because the First Amendment precludes civil actions that arise out of ecclesiastical controversies. Specifically, the Diocese contends that issues involving internal church governance, including ecclesiastical matters, religious beliefs, and church doctrine, are beyond a secular court's scope of review. In support of this argument, the Diocese relies on *Young v. Northern Illinois Conference of United Methodist Church*, 21 F.3d 184 (7th Cir. 1994), and *Alicea-Hernandez v. Catholic Bishop of Chicago*, 320 F.3d 698 (7th Cir. 2003).

In *Alicea-Hernandez*, the Seventh Circuit discussed the formation and evolution of what has come to be known as "the ministerial exception," which holds that in the context of Title VII claims brought against a church by its ministers, the "balance weighs in favor of free exercise of religion" and against the application of Title VII. 320 F.3d at 702-03, citing *McClure v. The Salvation Army*, 460 F.2d 553, 560 (5th

Cir. 1972); *Rayburn v. General Conference of Seventh-Day Adventists*, 772 F.2d 1164, 1168 (4th Cir. 1985).

> [T]he ministerial exception to Title VII is robust where it applies . . . . The exception precludes any inquiry whatsoever into the reasons behind a church's ministerial employment decision. The church need not, for example, proffer any religious justification for its decision, for the Free Exercise Clause "protects the act of a decision rather than a motivation behind it."

EEOC v. Roman Catholic Diocese of Raleigh, North Carolina, 213 F.3d 795, 802 (4th Cir. 2000). The Court of Appeals then indicated that "in determining whether an employee is considered a minister for purposes of applying this exception, we do not look to ordination but instead to the function of the position." *Alicea-Hernandez*. 320 F.3d at 703, *citing Young*, 21 F.3d at 186; *Roman Catholic Diocese*, 213 F.3d at 801. A communications manager who was a liaison between the church and the community to whom it directed its message was determined to serve a ministerial function for the church, and the Seventh Circuit found that the dismissal of her Title VII claims for lack of subject matter jurisdiction was appropriate. *Alicea-Hernandez*, 320 F.3d at 704.

In *Roman Catholic Diocese*, which was relied on by the Seventh Circuit in *Alicea-Hernandez*, the Fourth Circuit addressed the specific question of whether a director of music ministry and part-time music teacher at the affiliated elementary school was a ministerial employee. The court affirmed the dismissal of the employee's Title VII claims because her duties primarily "consisted of the selection, presentation, and teaching of music, which is integral to the spiritual and pastoral mission of the Catholic Church and many other religious traditions." 213 F.3d at 797. In so holding, the Fourth Circuit articulated the general rule that "if the employee's primary duties consist of teaching, spreading the faith, church governance, supervision of a religious order, or supervision or participation in religious ritual and worship, he or she should be considered clergy." *Id.*

at 801. The Fifth Circuit reached a similar conclusion in *Starkman v. Evans*, 198 F.3d 173, 175-76 (5th Cir. 1997), when it determined that the ministerial exception should be extended to a lay choirmaster and director of music as "religious music plays a highly important role in the spiritual mission of the church," and the job required the plaintiff to perform ministerial functions warranting First Amendment protection.

Here, Tomic held the positions of Director of Music and Organist for the Diocese and Director of Music and Organist for St. Mary's Cathedral. As indicated by the job description for these positions, the goal of the position was to "assist the Office of Divine Worship in preparing and celebrating various diocesan liturgies." Performance responsibilities included: assisting in preparing materials, practicing and playing music before, during, and after the Masses and liturgies, recruiting and training choir members and cantors, and conducting weekly rehearsals for choirs and cantors.

Tomic attempts to distinguish himself from the communications director in *Alicea-Hernandez*, arguing that none of these duties involved ministerial acts and that any involvement that he had with the public or congregation was incidental. However, by focusing solely on the public relations or "message dissemination" aspect of the position analyzed in that case, he has restricted the contours of the ministerial exception in a manner not supported by case law.

As the Fourth Circuit noted in *Roman Catholic Diocese*:

> At the heart of this case is the undeniable fact that music is a vital means of expressing and celebrating those beliefs which a religious community holds most sacred. Music is an integral part of many different religious traditions. It serves a unique function in worship by virtue of its capacity to uplift the spirit and manifest the relationship between the individual or congregation and the Almighty.... Thus, inasmuch as [the plaintiff's] duties involve the expression of the church's musical tradition, it is a

> fallacy to denominate them as merely secular. We refuse to demote music below other liturgical forms or to sever it from its spiritual moorings. We cannot say, for example, that the reading of scripture or the reciting of prayers is any more integral to religious worship than the singing of hymns or the intonation of chants. Whether spoken or sung, psalms lift eyes unto the hills. It is not for us to place the oratorios of Handel, the cantatas of Bach, or the simplest of hymns beneath the reading of the sacred text from which they draw.... The efforts of a music minister or teacher can thus influence the spiritual and pastoral mission of the church as much as one who would lead the congregation in prayer, preach from the pulpit, or teach theology in school.

213 F.3d at 802-03. Like the choir directors/music directors in *Roman Catholic Diocese* and *Starkman*, Tomic was clearly a pivotal figure in musical life in the Diocese and at St. Mary's. He was responsible for assisting in the preparation and celebration of liturgies, assisting the parish secretary in the preparation of liturgical aids, recruiting, rehearsing and conducting the choirs, and recruiting and training cantors, "functions at the very heart of the church's musical life." *Id.* at 803. Given these realities, Tomic's attempt to distinguish himself from the plaintiffs in *Roman Catholic Diocese* and *Starkman* is unavailing.

The Court therefore concludes that Tomic's duties and functions in his positions as Director of Music and Organist were integral to the spiritual and pastoral mission of the Diocese, thereby falling within the contours of the ministerial exception. As such, his claims attacking the reasonableness of the Diocese's personnel decision with respect to his employment status and the circumstances of his discharge involve ecclesiastical decisions that are placed beyond the subject matter jurisdiction of the Court by the Free Exercise Clause of the First Amendment. The Diocese's Motion to Dismiss must therefore be granted in this respect.

To the extent that it could be determined that the ministerial exception does not apply to Tomic's claims for breach of contract or defamation, the Court declines to exercise supplemental jurisdiction over these pendent state-law claims pursuant to 28 U.S.C. § 1367. *Wright v. Associated Ins. Co. Inc.*, 29 F.3d 1244, 1250 (7th Cir. 1994), *citing* 28 U.S.C. § 1367(c)(3). Having determined that Tomic's Title VII and ADEA claims cannot proceed in federal court, no federal claims remain, and there can be no question that the remaining state claims predominate. After weighing the relevant factors of judicial economy, convenience, fairness, and comity, the Court finds that the balance weighs in favor of declining to exercise supplemental jurisdiction and dismisses the claims in Counts II and III without prejudice to their being refiled in state court.

CONCLUSION

For the reasons set forth above, Defendant's Motion to Dismiss [#4] is GRANTED. This matter is now TERMINATED.

ENTERED this 16th day of November, 2004.

s/ Michael M. Mihm
Michael M. Mihm
United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS

RICHARD TOMIC,

Plaintiff,

v.

CATHOLIC DIOCESE OF PEORIA,
a Religious Corporation,

Defendant.

Case No. 04-1184

[STAMP: FILED June 11, 2004]

COMPLAINT AND DEMAND FOR JURY TRIAL

Plaintiff RICHARD TOMIC alleges as his Complaint against CATHOLIC DIOCESE OF PEORIA, a Religious Corporation (the "Diocese") as follows:

INTRODUCTION

1. This is an action against CATHOLIC DIOCESE OF PEORIA, a Religious Corporation, for its wrongful discharge of Richard Tomic in violation of the Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. §621, et seq. (the "ADEA") and 42 U.S.C. §2000e ("Title VII") when it wrongfully discharged RICHARD TOMIC in violation of federal law. Additionally, plaintiff is seeking damages for breach of contract and defamation.

PARTIES

2. Plaintiff RICHARD TOMIC is a resident of Peoria, Illinois.

3. Defendant CATHOLIC DIOCESE OF PEORIA. is a Religions Corporation with its principal place of business

in Peoria, Illinois; it has, on information and belief, in excess of fifty (50) employees.

JURISDICTION

4. This Court has jurisdiction over this matter pursuant to 28 USCA §1331. Plaintiff's cause of action arises under the Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. §621, et seq. (the "ADEA") and 42 U.S.C. §2000e ("Title VII"). Additionally, jurisdiction over the state law claims is proper pursuant to 28 U.S.C. 1367.

5. On May 7, 2004, the U.S. Equal Employment Opportunity Commission ("EEOC") issued to plaintiff a Notice of Right to Sue defendant in the United States District Court. A copy of the Notice of Right to Sue is attached as Exhibit A. Plaintiff has filed suit within 90 days of his receipt of the Notice of Right to Sue.

6. Venue is proper pursuant to 28 USCA §1391(a). This is the judicial district where a substantial part of the events or omissions giving rise to the claim occurred.

BACKGROUND

7. Plaintiff was hired by defendant as the Director of Music and Organist at St. Mary's Cathedral in March of 1996. Plaintiff became a full time employee of the Diocese in or around July ~~of 1998,~~ when he assumed the additional role of Director of Music and Organist for the Catholic Diocese of Peoria, and remained employed in that dual capacity until the date of his wrongful termination on March 25, 2003.

8. Until the date of his wrongful termination, plaintiff performed his duties in an exemplary manner.

9. During the period between March 20, 2003 and March 25, 2003, plaintiff had several discussions with the Bishop's assistant, Rev. Jason Gray. The first of these discussions on March 20, 2003 concerned the scheduling of choir practices and music for the coming Holy Week and Easter. Plaintiff had expressed his concerns to Rev. Gray that the scheduling he (Gray) was requesting would have a detrimental effect on the music scheduled for Easter week. These

discussions culminated in plaintiff's termination on March 25, 2003. During the course of these discussions, it was revealed to plaintiff that the Diocese was hiring a new organist and choir director "to assist" plaintiff. Plaintiff was abruptly terminated on March 25, 2003. Plaintiff was given no warning, no opportunity to appeal this termination, no hearing or due process of any kind, and never given a reason for his termination. In fact, while contesting plaintiff's application for unemployment compensation, the Diocese first took the position that plaintiff left his job voluntarily and later took the position that he was terminated for misconduct. Each of these assertions is untrue.

10. Plaintiff is 52 years old. Upon termination, plaintiff was promptly replaced by a much younger individual, age approximately 30, picked by Bishop Jenky. Plaintiff is informed and believes and thereon alleges that the termination for "misconduct" was pretextual, and was part of a decision to replace plaintiff with a younger individual.

11. As a result of his wrongful termination, plaintiff has suffered great harm, including the loss of reputation and the loss of income as well as the loss of medical and related insurance and personal benefits.

12. Defendant's actions constitute an unlawful termination, in violation of the provisions of the ADEA and Title VII.

FIRST COUNT FOR AGE DISCRIMINATION

13. Plaintiff incorporates by reference the allegations of paragraphs 1 through 12 of this Complaint as though set forth in full at this point.

14. The acts alleged herein violate provisions of the ADEA and Title VII prohibiting discrimination against an employee because of his age. Plaintiff is informed and believes, and thereon alleges, that defendant undertook an intentional and malicious campaign to eliminate him from the pool of defendant's employees and to replace him with a younger employee.

15. Defendant engaged in its discriminatory practices with malice and with reckless indifference to the federally protected rights of plaintiff. Plaintiff is therefore entitled to an award of punitive damages to the maximum extent permitted by law.

SECOND COUNT FOR BREACH OF CONTRACT

16. Plaintiff incorporates by reference the allegations of paragraphs 1 through 15 of this Complaint as though set forth in full at this point.

17. Plaintiff was employed pursuant to written agreements signed with defendant. True and correct copies of the agreements are attached hereto as Exhibit B and incorporated by reference at this point.

18. As a result of the employment relationship which existed between plaintiff and defendant employer, the expressed and implied promises made in connection with that relationship, and the acts, conduct, and communications resulting in these implied promises, defendant employer promised to act in good faith toward and deal fairly with plaintiff. This requires, among other things, that: (a) each party in the relationship must act with good faith toward the other concerning all matters related to the employment; (b) each party in the relationship must act with fairness toward the other concerning all matters related to the employment; (c) neither party would take any action to unfairly prevent the other from obtaining the benefits of the employment relationship; (d) defendant employer would similarly treat employees who are similarly situated; (e) defendant employer would comply with its own representations, rules, policies, and procedures in dealing with plaintiff; (f) defendant employer would not terminate plaintiff without a fair and honest cause, regulated by good faith on defendant employer's part; (g) defendant employer would not terminate plaintiff in an unfair manner; and (h) defendant employer would give plaintiff's interests as much consideration as it gave its own interests.

19. Defendant employer's termination of plaintiff was wrongful, in bad faith, and unfair, and therefore a violation of defendant employer's legal duties. Plaintiff further alleges that defendant employer breached the covenant of good faith and fair dealing when it:

(a). refused to abide by its own policies when dealing with plaintiff;

(b). denied the existence of the contract and the agreements made with plaintiff;

(c). attempted to unfairly prevent plaintiff from obtaining the benefits of his employment relationship;

(e). terminated plaintiff's employment for expressing legitimate concerns about scheduling difficulties;

(f). terminated plaintiff's employment for false reasons and in a manner that was inconsistent with defendant employer's stated policies and practices.

20. Defendant employer's breach of the covenant of good faith and fair dealing was a substantial factor in causing damage and injury to plaintiff. As a direct and proximate result of defendant employer's unlawful conduct alleged in this complaint, plaintiff has lost substantial employment benefits with defendant employer, including loss of reputation, lost wages, and other employee fringe benefits, the precise amount of which will be proven at trial.

THIRD COUNT FOR DEFAMATION PER SE

21. Plaintiff incorporates by reference paragraphs 1 through 20 of his Complaint as though fully set forth at this point.

22. Plaintiff RICHARD TOMIC is a professional who has dedicated many years to developing his professional reputation as a church music director and organist.

23. Since his termination, Diocese employees, including Rev. Gray and Rev. Joseph Donton, the Cathedral Rector, have undertaken a continuous campaign of false and defamatory statements, sometimes in public gatherings, maligning

plaintiff's professional integrity. Instances include the following:

a. On or around March 30, 2003, Rev. Joseph Donton announced to his congregation, from the pulpit, that Mr. Tomic had "turned in his keys" so they would not have any music during the remainder of the Lenten Season.

b. During the period between March 25, 2003, and January 1, 2004, Rev. Gray told several individuals, including Susan Budde, a choir director in Moline, that plaintiff had walked off of his job two weeks before Easter, that he had "trashed" the office computer, and that he was a "private" person who had trouble with change.

24. These false allegations have spread throughout the church music community, and have come to plaintiff's attention from sources in Moline, Champaign, Rantoul, Galesburg and, of course, Peoria.

25. The net effect of these false and defamatory statements is that plaintiff has had great difficulty in securing a position elsewhere.

26. As a result of the false and defamatory statements, those who heard them were all given the idea that plaintiff was unprofessional, unstable, and untrustworthy.

27. Such defamatory statements made by the Defendant constitute *slander per se* as they were allegations which were concerned with, interfered with, and affected plaintiff's business and profession.

28. As a result of the false and defamatory statements made by the defendant, plaintiff has been seriously injured and suffered damages in an amount to be determined at time of trial.

29. These statements by Rev. Gray and Rev. Donton were made in the course and scope of their employment by, and relationship with, defendant, and were made with its explicit assent and approval. Defendant, by its conduct, prior to and following the defamatory publications, assented to and encouraged the publication of the defamatory statements.

30. Defendant has acted willfully, maliciously and oppressively, without regard to plaintiff, therefore entitling plaintiff to an award of punitive damages in an amount to be determined at the time of trial.

PRAYER

WHEREFORE it is requested that the Court grant the following relief:

AS TO COUNT ONE:

A. Declare the conduct of defendant to be a violation of federal law;

B. Award plaintiff compensatory damages sufficient to compensate him for his back wages, the loss of his benefits, prospective income and pension;

C. Grant plaintiff an award of punitive damages to the maximum extent permitted by law;

D. Award plaintiff his costs and reasonable attorneys' fees for the pursuit of this action;

E. Order such other relief as the court deems just.

AS TO COUNT TWO:

A. Award plaintiff compensatory damages as determined by proof at time of trial;

B. Order such other relief as the court deems just.

AS TO COUNT III:

A. Award plaintiff compensatory damages as determined by proof at time of trial;

B. Grant plaintiff an award of punitive damages to the maximum extent permitted by law;

C. Order such other relief as the court deems just.

Respectfully submitted,
JACKSON THOMAS LLP
By: /s/_____
Stephen J. Thomas
Attorney for Plaintiff

Dated: June 11, 2004

DEMAND FOR JURY TRIAL

Jury trial is demanded.

Respectfully submitted,
JACKSON THOMAS LLP
By: /s/
Stephen J. Thomas

Dated: June 11, 2004

Stephen J. Thomas
JACKSON THOMAS LLP
416 Main Street, Suite 717
Peoria, IL 61602
Phone: 309.637.8888
Fax: 309.637.8838

APPENDIX D

CATHOLIC DIOCESE OF PEORIA
OFFICE OF DIVINE WORSHIP
EMPLOYMENT AGREEMENT

This EMPLOYMENT AGREEMENT between Richard J. Tomic and the Office of Divine Worship of the Catholic Diocese of Peoria is intended to set forth guidelines and procedure in connection with the particular employment position. Nothing contained in this Employment Agreement is intended, and should not be interpreted, to guarantee employment for any specific period of time. Employees of the Diocese of Peoria are employees at will. Circumstances may arise in which the Diocese of Peoria determines that changes are required in these guidelines and procedures. For this reason, The Diocese of Peoria reserves the right, at any time, to modify, rescind, or supplement any or all of the guidelines or procedures contained herein, and to take actions which may be contrary to a guideline or procedure set forth in this Agreement.

1. The Diocese will employ Richard J. Tomic part time in the position of Diocesan Music Director beginning July 1, 1999.

2. The duties will be stated in the attached job description and other such duties as are assigned from time to time by the Director of the Office of Divine Worship, the Vicar General/Moderator of the Curia or the Bishop.

3. Salary will be compensated in the following manner.

a. hourly office work will be compensated at $15.00 / hour [This includes rehearsal time with the group; personal rehearsal time is not compensated];

b. workshop direction will be compensated at $100.00 / hour;

c. participation or direction of diocesan liturgical events such as ordinations, Chrism Mass, Mass for

New Catholics, the Rite of Election, funerals of clergy will be compensated at $100.00 per event. Should the Diocesan Music Director play as well as direct, he will be compensated for both.

The payment of the salary and other remuneration is based upon actual hours worked.

4. Richard J. Tomic will be reimbursed for reasonable business expenses incurred on behalf of the Diocese, provided approval is received from the department head in advance.

5. During the life of this Agreement all revenues identified with the Office of Divine Worship shall be the exclusive property of the Diocese. It is specifically agreed and understood as follows:

a. The diocese shall receive and be vested in full ownership of all gifts and grants of money or other property to or for use with respect to the office from any source whatsoever;

b. The diocese shall receive and be vested in full ownership of all other revenues of the department.

6. In fulfilling the job description Richard J. Tomic agrees to accept the direction of the Director of the Office of Divine Worship, the Vicar General/Moderator of the Curia or the Bishop in the exercise of responsibilities.

7. Richard J. Tomic further agrees to become familiar with and abide by all policies as set forth in the Handbook of Personnel Policies for the Diocese of Peoria, including an annual review of the Sexual Abuse Policies of the Diocese of Peoria.

8. Upon leaving the position, for whatever reason, Richard J. Tomic agrees to return all materials, documents and notes concerning the position to the department head, including all copies and agrees to hold in confidence and never use or disclose to any third party any secret or confidential information of this position.

All intellectual or physical products produced by Richard J. Tomic in or for an office of the diocese with materials

provided by the diocese and supervision extended by the diocese are to be considered work for hire materials which belong to the diocese.

/s/ _____

Richard J. Tomic

/s/ _____

Barbara A. Logan

DIVINE WORSHIP
JOB DESCRIPTION
DIOCESAN MUSIC DIRECTOR

Position Goal: To assist the Office of Divine Worship in preparing and celebrating various diocesan liturgies. To prepare and present various workshops or resources as requested. To assist other diocesan entities, viz. parishes, religious communities, and/or diocesan offices in planning and celebrating liturgical events as requested.

Accountability: The music director is accountable to the Director of the Office of Divine Worship, or in her absence to the Vicar General.

Evaluation: An annual evaluation by the Director and/or Vicar General will be conducted.

Work parameters: The position calls for work to be completed as needed. Actual days and hours will remain flexible depending on deadlines and events. It is extremely important that the music director (or someone he delegates) be available for emergency situations, such as funerals, which call for shortened deadlines. Rehearsal will be scheduled with consultation of the pastor/office of the parish involved.

Performance Responsibilities (relating to):

1 Director of the Office of Divine Worship

—Collaborate with and coordinate all requests for participation at diocesan events

—Maintain records of resources and personnel

—Respond to correspondence and phone messages which deal with music

2 Resources

—Review resources available; make suggestions for additions

—Keep records of resources used in prior years

—Preview new releases or resources that would be useful to the Office

3 Programs / Workshops / Liturgical celebrations—

—Assist in preparing materials

—Organize logistics of presentations

—Contact additional personnel

—Keep records; present expenses to the Office

—Rehearse as needed with various personnel

—Be available the date of the event

—Follow-up with review and thank-you's

4. Liturgical Participation aids

—Assist in preparing booklets by submitting songs, materials etc. as requested

—Provide names of personnel involved

5. Finances

—Maintain accurate records of hours worked

—Submit payment for salary requests monthly or quarterly: checks are usually written on Wednesday each week

—Submit any requests for remuneration using above schedule

—Submit any bills related to Office expenses as soon as received

EMPLOYMENT AGREEMENT
DIOCESE OF PEORIA

CATHEDRAL OF ST. MARY

This EMPLOYMENT AGREEMENT between Richard J. Tomic and the Cathedral of St. Mary is intended to set forth guidelines and procedures in connection with the particular employment position. Nothing contained in this Agreement is intended, and should not be interpreted, to guarantee employment for any specific period of time. Employees of the Diocese of Peoria are employees at will. Circumstances may arise in which the Diocese of Peoria determines that changes are required in these guidelines and procedures. For this reason, the Diocese of Peoria reserves the right, at any time, to modify, rescind, or supplement any or all of the guidelines or procedures contained herein, and to take actions which may be contrary to a guideline or procedure set forth in the this Agreement.

1. The Cathedral of St. Mary will employ Richard J. Tomic in the position of Organist / Music Director beginning July 1, 1999.

2. The duties will be as stated in the attached job description and other duties as are requested from time to time by the Pastor / Rector and agreed to by the Organist / Music Director.

3. The salary will be based on an annual figure of Fifteen Thousand Two Hundred Ninety-two Dollars ($15,292) payable in twenty-four (24) equal installments on the 15th and last working day of each month.

4. The Cathedral of St. Mary agrees to provide the following employment benefits in accordance with the current terms and provisions of these plans as determined by the Handbook of Personnel Policies of the Diocese of Peoria and which may be amended from time to time; single medical insurance coverage paid through a joint agreement between

the Office of Divine Worship and the Cathedral, Equivest and unemployment compensation if applicable.

5. The Cathedral of St. Mary will grant paid time off for vacation, sick days and personal days in accordance with the eligibility under the terms set forth in the Handbook of Personnel Policies of the Diocese of Peoria. Effective with this Agreement, for this time period, Richard J. Tomic is eligible to accrue the following paid time off:

14 Days (2 weeks including 2 weekends) - Vacation Time

12 Days - Sick Time (for use only during actual illness or injury)

3 Days - Personal Time

6. Family medical leave will be available when necessary, upon completion of necessary requirements as set forth in the Family Medical Leave Policy for the Diocese of Peoria located in the Handbook of Personnel Policies of the Diocese of Peoria.

7. Richard J. Tomic agrees to fulfill all the responsibilities of the position. The hours of work shall conform as closely as possible to the regular parish office hours unless directed otherwise by the Pastor / Rector. These work hours may vary if the specific nature of the responsibilities requires other hours and the Pastor / Rector agrees to these hours.

8. In fulfilling the job description Richard J. Tomic agrees to accept the direction and supervision of the Pastor / Rector and the exercise of the responsibilities.

9. Richard J. Tomic further agrees to become familiar with and abide by all policies as set forth in the Handbook of Personnel Policies of the Diocese of Peoria, including an annual review of the Sexual Harassment and Abuse Policies of the Diocese of Peoria.

10. Richard J. Tomic will be reimbursed for reasonable business expenses incurred on behalf of the parish, provided approval is received from the Pastor / Rector in advance.

11. Upon leaving the position, for whatever reason, Richard J. Tomic agrees to return all equipment, materials, documents and notes concerning the position to the Pastor / Rector, including all copies and agrees to hold in confidence and never use or disclose to any third party any secret or confidential information of this parish.

Any public act or the publication of any act not consistent with the religious and moral teachings of the Catholic Church will be sufficient cause for discharge. Other causes for termination (although the list is not all-inclusive) are listed in the Handbook of Personnel Policies of the Diocese of Peoria.

AGREED TO AND ACCEPTED:

/s/_____	7-1-99
EMPLOYEE	DATE
/s/_____	7-1-99
PASTOR/RECTOR	DATE

NOTE: This Agreement is to be filled out/signed in triplicate:

- one copy for Rector / Pastor;
- one copy for Employee;
- one copy for Employee's personnel file.

ADDENDUM

1. The Organist / Music Director shall receive a fee of $125.00 for all weddings at the Cathedral;

2. The Organist / Music Director shall receive a stipend of $75 for all funerals at the Cathedral;

3. The Organist / Music Director will be reimbursed for all expenses including fees, travel, lodging and meals for one professional conference/convention per year.

4. The Organist / Music Director is entitled to membership in professional organizations related to their position as Organist / Music Director with the approval of the Rector / Pastor. Application fees and membership dues will be paid by the Cathedral.

5. The Organist / Music Director has the option of using the piano/organ for lessons taught at the Cathedral.

AGREED TO AND ACCEPTED:

/s/	7-1-99
EMPLOYEE	DATE
/s/	7-1-99
PASTOR/RECTOR	DATE

ORGANIST / MUSIC DIRECTOR
Job Description

ORGANIST / ACCOMPANIST

1. Practice Cathedral-scale organ literature to be played before, during, and after the Masses and liturgies described below;

2. Play for all weekend parish Masses at the Cathedral—Saturday (5:30 p.m.) and Sunday (10:30 a.m.)

3. Play for all special parish Masses—Christmas Eve (5:30 p.m., 10:30 p.m.), Christmas Day (10:30 a.m.), Ash Wednesday, Sacred Triddum (Holy Thursday, Good Friday, Easter Vigil), Easter Sunday (10:30 a.m.), Holy days;

4. Play for all weddings and funerals at the Cathedral (See Employee Agreement Addendum);

5. Play for all Diocesan Events at the Cathedral in accord with the Office of Divine Worship Employee Agreement.

6. Secure substitutes when needed.

MUSIC DIRECTOR

1. Prepare music for all parish Masses and liturgies described above in consultation with the Rector / Pastor when necessary;

2. Recruit and train choir members and cantors;

3. Conduct weekly choir/cantor rehearsals;

4. Prepare the *cantor* for all *Saturday and Holy Day Masses* at the Cathedral;

5. Prepare the *choir* for all *Sunday and Special Masses* at the Cathedral;

6. Prepare all liturgical aids in cooperation with the parish secretary;

7. Secure substitutes or instrumentalists and additional vocalists when needed.

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I. GENERAL INFORMATION

A. Equal Opportunity Employer

The Diocese of Peoria is an Equal Opportunity Employer, and candidates for employment shall be considered on the basis of their qualifications, without regard to race, color, sex, age, physical handicap, national origin, or ancestry, although preference is generally given to persons of the Roman Catholic faith.

Candidates are responsible for making available to the Diocese facts about themselves with regard to education, training and experience as well as individual interests.

The Diocese may consider an applicant or employee's marital status, if said status is against the teachings of the Church.

All employees, regardless of religious denomination, shall conform to the moral standards of the Catholic faith.

B. Sexual Harassment or Other Forms of Harassment

It is the policy of the Diocese of Peoria to maintain a work environment free of unlawful discrimination for all employees. Sexual harassment and other forms of harassment are unacceptable conduct which violates this policy. A Harassment Policy for the Diocese of Peoria is included in Section VIII—Article C of this Policy Book.

C. Religious Employees

Religious working in the diocesan offices will be governed by the policies herein contained, except in cases in which there is a conflict between these policies and the obligation of their state in life. Such conflicts should be settled with the Vicar General/Moderator of the Curia or the Bishop.

APPENDIX E

CONSTITUTIONAL AND STATUTORY PROVISIONS

1. The First Amendment to United States Constitution provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof[.]

2. The Age Discrimination in Employment Act, 29 U.S.C. § 623, provides, in pertinent part:

(a) Employer practices

It shall be unlawful for an employer—

> **(1)** to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age[.]

3. The Religious Freedom Restoration Act, 42 U.S.C. § 2000bb *et seq.*, provides, in pertinent part:

§ 2000bb-1. Free exercise of religion protected

(a) In general

Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b) of this section.

(b) Exception

Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person—

(1) is in furtherance of a compelling governmental interest; and

(2) is the least restrictive means of furthering that compelling governmental interest.

(c) Judicial relief

A person whose religious exercise has been burdened in violation of this section may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against a government. Standing to assert a claim or defense under this section shall be governed by the general rules of standing under article III of the Constitution.

§ 2000bb-2. Definitions

As used in this chapter—

(1) the term "government" includes a branch, department, agency, instrumentality, and official (or other person acting under color of law) of the United States, or of a covered entity;

(2) the term "covered entity" means the District of Columbia, the Commonwealth of Puerto Rico, and each territory and possession of the United States;

(3) the term "demonstrates" means meets the burdens of going forward with the evidence and of persuasion; and

(4) the term "exercise of religion" means religious exercise, as defined in section 2000cc-5 of this title.

§ 2000bb-3. Applicability

(a) In general

This chapter applies to all Federal law, and the implementation of that law, whether statutory or otherwise, and whether adopted before or after November 16, 1993.

(b) Rule of construction

Federal statutory law adopted after November 16, 1993 is subject to this chapter unless such law explicitly excludes such application by reference to this chapter.

(c) Religious belief unaffected

Nothing in this chapter shall be construed to authorize any government to burden any religious belief.

§ 2000bb-4. Establishment clause unaffected

Nothing in this chapter shall be construed to affect, interpret, or in any way address that portion of the First Amendment prohibiting laws respecting the establishment of religion (referred to in this section as the "Establishment Clause"). Granting government funding, benefits, or exemptions, to the extent permissible under the Establishment Clause, shall not constitute a violation of this chapter. As used in this section, the term "granting", used with respect to government funding, benefits, or exemptions, does not include the denial of government funding, benefits, or exemptions.

(1)

FILED
AUG 4 - 2006
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 06-15

IN THE

Supreme Court of the United States

RICHARD TOMIC,

Petitioner,

v.

CATHOLIC DIOCESE OF PEORIA,
a religious corporation,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF IN OPPOSITION

Karen L. Kendall
Counsel of Record
Craig L. Unrath
HEYL, ROYSTER, VOELKER & ALLEN
124 S.W. Adams Street, Suite 600
Peoria, IL 61602
309-676-0400

William Carter
CARR MALONEY P.C.
1615 L Street, NW, Suite 500
Washington, DC 20036
202-310-5500

Attorneys for Catholic Diocese of Peoria, a religious corporation

QUESTION PRESENTED FOR REVIEW

Whether an exception to federal employment laws arising under the First Amendment bars a Music Director's claim for age discrimination, where the Music Director served as a spiritual leader and filled a prominent and indispensable role in the celebration of the Catholic worship service?

RULE 29.6 NOTATION

The Respondent has no parent, and there are no publicly held companies that hold any stock of the petitioner.

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STATEMENT OF THE CASE

In 1996, St. Mary's Cathedral hired Petitioner, Richard Tomic, as the Director of Music and Organist. He later assumed the additional role of Director of Music and Organist for the Catholic Diocese of Peoria.

In his Statement of the Case, Petitioner offers a description of the organist and music director's duties, but in doing so, appears to have minimized any reference to his direct participation in the Catholic Church service other than "playing the organ." Indeed, to read Tomic's Statement leaves one with the impression that he played little or no role at all in the actual church service. In fact, Tomic's employment agreement explicitly stated that he would be compensated for "participation" and "direction "of diocesan liturgical events such as ordinations, Chrism Mass, Mass for New Catholics, the Rite of Election, and funerals of clergy (Pet., p. 29a-30a). The employment agreement described the position of Music Director as follows:

> **Position Goal:** To assist the Office of Divine Worship in preparing and celebrating various diocesan liturgies. To prepare and present various workshops or resources as requested. To assist other diocesan entities, viz. parishes, religious communities, and/or diocesan offices in planning and celebrating liturgical events as requested.

The employment agreement provided that the music director was directly accountable to the Director of the Office of Divine Worship or, in her absence, to the Vicar General.

As to his position as Organist / Music Director for St. Mary's, Tomic received compensation of an annual salary, which was supplemented with fees for performing at weddings

and funerals at the Cathedral. The agreement described the position of Organist / Music Director as follows:

Organist / Accompanist

1. Practice Cathedral-scale organ literature to be played before, during, and after the Masses and liturgies described below;

2. Play for all weekend parish Masses at the Cathedral – Saturday (5:30 p.m.) and Sunday (10:30 a.m.);

3. Play for all special parish Masses – Christmas Eve (5:30 p.m., 10:30 p.m.), Christmas Day (10:30 a.m.), Ash Wednesday, Sacred Triddum, (Holy Thursday, Good Friday, Easter Vigil), Easter Sunday (10:30 a.m.), Holy days;

4. Play for all weddings and funerals at the Cathedral (See Employee Agreement Addendum);

5. Play for all Diocesan Events at the Cathedral in accord with the Office of Divine Worship Employee Agreement;

6. Secure substitutes when needed. (Pet., p. 38a).

The employment agreement provided the following job description for the position of Music Director.

> 1. Prepare music for all parish Masses and liturgies described above in consultation with the Rector / Pastor when necessary;
>
> 2. Recruit and train choir members and cantors;
>
> 3. Conduct weekly choir/cantor rehearsals;
>
> 4. Prepare the cantor for all Saturday and Holy Day Masses at the Cathedral;
>
> 5. Prepare the choir for all Sunday and Special Masses at the Cathedral;
>
> 6. Prepare all liturgical aids in cooperation with the parish secretary;
>
> 7. Secure substitutes or instrumentalists and additional vocalists when needed. (Pet., p. 38a) (emphasis in original).

These duties formed the basis of the Respondent's argument characterizing Petitioner's duties as lying at the very core of the Catholic church service.

Respondent filed a motion to dismiss Tomic's claim under Title VII arguing that a lay employee of a religious institution

should be deemed a "minister" where his or her primary duties consist of supervision and participation in religious ritual and worship. Respondent argued that the "ministerial exception" precluded application of Title VII to the employment relationship between Petitioner and the Diocese.

The District Court agreed, finding that Tomic's duties and functions in his position as Director of Music and Organist "were integral to the spiritual and pastoral mission of the Diocese, thereby falling within the contours of the ministerial exception." (Pet., p. 18a). The court further explained that:

> As such, his claims attacking the reasonableness of the Diocese's personnel decision with respect to his employment status and the circumstances of his discharge involve ecclesiastical decisions that are placed beyond the subject matter jurisdiction of the Court by the Free Exercise Clause of the First Amendment (Pet., p. 18a).

The District Court declined to exercise jurisdiction over the remaining common law claims and dismissed the suit (Pet., p. 19a).

The Seventh Circuit Court of Appeals affirmed, explaining that, even if a suit does not involve an issue of religious doctrine, but concerns merely the governance structure of the church, the courts will not assume jurisdiction if doing so would interfere with the church's management. The court reaffirmed the fundamental right of churches to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine. *Tomic v. Catholic Diocese of Peoria*, 442 F.3d 1036, 1038 (7th Cir. 2006).

The court explained that First Amendment concerns with assuming jurisdiction are two-fold. The first concern is that secular authorities would be involved in evaluating or interpreting religious doctrine. The second concern is that in

investigating employment discrimination claims by ministers against their church, secular authorities would necessarily intrude into church governance in a manner that would be inherently coercive, even if the alleged discrimination was purely nondoctrinal. *Tomic v. Catholic Diocese of Peoria*, 442 F.3d 1036, 1039 (7th Cir. 2006).

As to Petitioner's role as music director, the court noted that music is an integral part of Catholic religious traditions as it is in many other religions. The court emphasized that music is a vital means of expressing and celebrating those beliefs which a religious community holds most sacred. As such, the court concluded that Petitioner's duties, unlike those, say, of the person who tunes the organ, had a significant religious dimension. As such, the ministerial exception applied to Petitioner's position and the court lacked jurisdiction over the case. *Tomic v. Catholic Diocese of Peoria*, 442 F.3d 1036, 1041 (7th Cir. 2006).

The court also addressed a recent decision of the Second Circuit Court of Appeals, *Hankins v. Lyght*, 441 F.3d 96 (2nd Cir. 2006), which held (over dissent) that the Religious Freedom Restoration Act, 42 U.S.C. §§2000bb *et seq*. (RFRA) amended the ADEA to wipe out the ministerial exception and substitute the RFRA's standard. The court found the decision unsound, agreeing with established and, until now, unanimous authority that the RFRA is applicable only to suits to which the government is a party. The court noted that it is difficult to imagine that, in seeking to broaden the protection of religious rights Congress, "dropping nary a hint," wiped out a long established doctrine that gives greater protection to religious autonomy than the RFRA does. *Tomic v. Catholic Diocese of Peoria*, 442 F.3d 1036, 1042 (7th Cir. 2006).

ARGUMENT

Reasons for Denying the Petition

A. Where a Church Employee's Position is Important to the Spiritual and Pastoral Mission of the Church, He or She is Considered a Member of the Clergy for Purposes of the Ministerial Exception to Employment Discrimination Laws.

The ministerial exception to Title VII was first articulated in *McClure v. Salvation Army*, 460 F.2d 553 (5th Cir. 1972), *cert. denied*, 409 U.S. 896, 93 S.Ct. 132, 34 L.Ed.2d 153 (1972), and has since been recognized in almost every federal judicial circuit.[1] The exception is rooted in the independence of the spiritual lives of religious bodies in accordance with the dictates of the First Amendment. *E.E.O.C. v. Roman Catholic Diocese of Raleigh, N.C.*, 213 F.3d 795, 800 (4th Cir. 2000). Personnel decisions by church-affiliated institutions affecting clergy are *per se* religious matters and cannot be reviewed by civil courts, for to review such decisions would require the courts to impose a secular court's view of whether religious

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[1] *Natal v. Christian and Missionary Alliance*, 878 F.2d 1575 (1st Cir. 1989); *Redhead v. Conference of Seventh-Day-Adventists*, 2006 WL 2075196 (E.D.N.Y.); *Petruska v. Gannon University*, 350 F. Supp.2d 666, 682 (W.D. Pa. 2004); *E.E.O.C. v. Roman Catholic Diocese of Raleigh,, N.C.*, 213 F.3d 795 (4th Cir. 2000); *Starkman v. Evans*, 198 F.3d 173 (5th Cir. 1999); *Young v. Northern Illinois Conference of United Methodist Church*, 21 F.3d 184 (7th Cir. 1994); *Scharon v. St. Luke's Episcopal Presbyterian Hospitals*, 929 F.2d 360 (8th Cir. 1991); *Werft v. Desert Southwest Annual Conference of the United Methodist Church*, 377 F.3d 1099 (9th Cir. 2004); *Bryce v. Episcopal Church in the Diocese of Colorado*, 289 F.3d 648 (10th Cir. 2002) (referred to as the "church autonomy doctrine."); *Gellington v. Christian Methodist Episcopal Church, Inc.*, 203 F.3d 1299 (11th Cir. 2000); *E.E.O.C. v. Catholic University of America*, 83 F.3d 455 (D.C. 1996).

doctrine and canonical law support the decision the church authorities have made. *Scharon v. St. Luke's Episcopal Presbyterian Hospitals*, 929 F.2d 360, 363 (8th Cir. 1991).

The relationship between an organized church and its ministers "is its lifeblood." The minister is the chief instrument by which the church seeks to fulfill its purpose. As such, matters touching this relationship must necessarily be recognized as of prime ecclesiastical concern. *McClure*, 460 F.2d at 558-59; see also *Hutchison v. Thomas*, 789 F.2d 392, 396 (6th Cir. 1986), *cert. denied*, 479 U.S. 885, 107 S.Ct. 277, 93 L.Ed.2d 253 (1986); *Kaufmann v. Sheehan*, 707 F.2d 355, 358-59 (8th Cir. 1983); *Simpson v. Wells Lamont Corp.*, 494 F.2d 490, 493 (5th Cir. 1974). It is well-settled that religious controversies are not the proper subject of civil court inquiry. Religious bodies must be free to decide for themselves, free from state interference, matters which pertain to church government, faith and doctrine. *Natal v. Christian and Missionary Alliance*, 878 F.2d 1575 (1st Cir. 1989).

Application of the ministerial exception has not been limited to cases involving clergy. Lay employees of religious institutions have been deemed "ministers" for the purposes of the exception where their primary duties consist of teaching, spreading the faith, church governance, supervision of a religious order, or supervision or participation in religious ritual and worship. *Rayburn v. General Conference of Seventh-Day Adventists*, 772 F.2d 1164, 1169 (4th Cir. 1985). The determination focuses on the function of the employee and the exception is applied if the position is "important to the spiritual and pastoral mission" of the religious institution. *Rayburn*, 772 F.2d at 1169 (4th Cir. 1985).

The ministerial exception does not insulate wholesale the religious employer from the operation of federal anti-discrimination statutes. See *Rayburn*, 772 F.2d at 1171-72. Rather, the scope of the ministerial exception to Title VII is limited to what is necessary to comply with the First

Amendment. *Bollard v. California Province of the Society of Jesus*, 196 F.3d 940, 947 (9th Cir. 1999). Its application in a given case requires a fact-specific inquiry. *E.E.O.C. v. Roman Catholic Diocese of Raleigh, N.C.*, 213 F.3d at 801.

Petitioner argues that the lower courts have reached varying positions on the scope of this exception and that this Court's clarification of the issue is "sorely needed." (Pet., p. 10.) As noted above, application of the ministerial exception is a fact-intensive inquiry utilized on a case-by-case basis. As such, it comes as no great surprise that courts will arrive at different conclusions based on varying circumstances. Nevertheless, an examination of the cases employing the ministerial exception reveals a high level of consistency in the manner and approach taken by the various circuits in an area of law that continues to develop.

For example, where an ordained minister files suit under Title VII, and where that claim is directed at an employment decision of a church, courts uniformly hold that such claims are barred under the ministerial exception.[2] The Ninth Circuit

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[2] *Natal v. Christian and Missionary Alliance*, 878 F.2d 1575 (1st Cir. 1989); *Rweyemamu v. Cote*, Slip Op. 2006 WL 306654 at 4 (Feb. 8, 2006, D. Conn.) ('We cannot conceive how the federal judiciary could determine whether an employment decision concerning a minister was based on legitimate or illegitimate grounds without inserting ourselves into a realm where the Constitution forbids us to tread, the internal management of a church.') quoting *Combs v. Central Texas Annual Conference Of United Methodist Church*, 173 F.3d 343, 350 (5th Cir. 1999); *Little v. Wuerl*, 929 F.2d 944, 947 (3rd Cir. 1991) ("...courts have consistently found that Title VII does not apply to the relationship between ministers and the religious organizations that employ them, even where discrimination is alleged on the basis of race or sex."); *Lewis v. Seventh Day Adventists Lake Region Conference*, 978 F.2d 940, 942 (6th Cir. 1992) ("We conclude that the First Amendment bars civil courts from reviewing decisions of religious judicatory bodies relating to the employment of clergy."); *Scharon v. St. Luke's Episcopal Presbyterian Hospitals*, 929 F.2d 360 (8th Cir. 1991); *Elvig v. Calvin Presbyterian Church*, 375 F.3d 951, 958 (9th Cir. 2004)

carved out an exception to this rule in Title VII claims where clergy allege sexual harassment. The court explained that allegations of sexual harassment are not a protected employment decision. But to the extent that the sexual harassment claims implicate the Church's ministerial employment decisions, those claims remain foreclosed. *Elvig v. Calvin Presbyterian Church*, 375 F.3d 951 (9th Cir. 2004); *Bollard v. California Province of the Society of Jesus*, 196 F.3d 940 (9th Cir. 1999).

Although the Second Circuit has not explicitly adopted the ministerial exception, it has not rejected it either. Indeed, a number of district courts from that circuit have addressed the issue in substance, if not in name, and have arrived at the same conclusion that would have been obtained in the majority of other circuits. For example, in a recent district court decision emanating from the Second Circuit, the court addressed a claim for racial discrimination brought by an ordained priest of the Catholic Church.[3] The court held that in a suit involving an employment decision with respect to one of its ministers, courts lack jurisdiction because the Free Exercise Clause bars court involvement in the employment relationship between a minister and a church.

In the case of lay employees, courts have held that the ministerial exception applies to employees of religious institutions whose primary duties consist of teaching, spreading the faith, church governance, supervision of a religious order,

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(". . . to the extent Elvig's claims necessarily involve an inquiry into the Church's *decision* to terminate her ministry, those claims cannot proceed in civil court and were properly dismissed."); *Gellington v. Christian Methodist Episcopal Church, Inc.*, 203 F.3d 1299 (11th Cir. 2000); *E.E.O.C. v. Catholic University of America*, 83 F.3d 455 (D.C. 1996).

[3] *Rweyemamu v. Cote*, Slip Op. 2006 WL 306654 (Feb. 8, 2006, D. Conn).

or supervision or participation in religious ritual and worship. *E.E.O.C. v. Catholic University of America*, 83 F.3d 455, 461 (D.C. 1996). If their positions are important to the spiritual and pastoral mission of the church, they are considered clergy for purposes of the ministerial exception. *Rayburn*, 772 F.2d at 1169.

This inquiry is necessarily fact-specific, but even so, and while the law continues to develop, courts have applied the exception consistently and uniformly. A number of courts have addressed the precise issue in the present case: whether a music director of a church is considered clergy for purposes of the ministerial exception. The Courts that have addressed this issue have uniformly concluded that the exception applies.[4]

For example, in *E.E.O.C. v. Roman Catholic Diocese of Raleigh, N.C.*, 213 F.3d 795 (4th Cir. 2000), the Fourth Circuit addressed a Title VII claim brought by a Director of Music Ministry. The court found that the position of music director was important to the spiritual and pastoral mission of the church, noting the "undeniable fact that music is a vital means of expressing and celebrating those beliefs which a religious community holds most sacred." *Id.* at 802. The court explained that music is an integral part of many different religious traditions, serving a unique function in worship by virtue of its capacity to uplift the spirit and manifest the relationship between the individual or congregation and the Almighty. *Id.* at 802.

The court refused to demote music below other liturgical forms or to sever it from its spiritual moorings ("Whether

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[4] *E.E.O.C. v. Roman Catholic Diocese of Raleigh*, N.C., 213 F.3d 795 (4th Cir. 2000); *Starkman v. Evans*, 198 F.3d 173 (5th Cir. 1999). *Miller v. Bay View United Methodist Church, Inc.*, 141 F. Supp.2d 1174 (E.D. Wis. 2001); *Egan v. Hamline United Methodist Church*, 679 N.W.2d 350 (Minn. 2004); *Assemany v. Archdiocese of Detroit*, 173 Mich. App. 752, 434 N.W.2d 233 (Mich. 1988).

spoken or sung, psalms lift eyes unto the hills. It is not for us to place the oratorios of Handel, the cantatas of Bach, or the simplest of hymns beneath the reading of the sacred texts from which they draw."). *Id.* at 802. The court paraphrased a statement by Justice Black of the United States Supreme Court stating that the inspirational appeal of religion in the guises of music, architecture, and painting is often stronger than in forthright sermon. *Id.*, quoting *People of State of Ill. ex rel. McCollom v. Board of Ed. of School Dist. No. 71, Champaign County, Ill.*, 333 U.S. 203, 236, 68 S.Ct. 461, 92 L.Ed. 649 (1948).

The court concluded that the role of the music minister is so significant in the expression and realization of the church's beliefs that state intervention in the appointment process would excessively inhibit religious liberty. Because employment decisions concerning a music director relate to how and by whom churches spread their message, these decisions lie beyond judicial competence. *E.E.O.C. v. Roman Catholic Diocese of Raleigh, N.C.*, 213 F.3d at 804.

There is no dispute among decisions rendered by courts which have considered the application of the ministerial exception to persons who occupy a position of music director. All courts have applied the ministerial exception to bar actions against a church by a lay person serving in that capacity. Here, Tomic served as a music director and represented the voice of the Church in spreading its message through music. As such, the ministerial exception was properly applied to bar his action against the Church.

Petitioner opened his argument before this Court with the following declaration:

> The court of appeals held in this case that the Constitution forbids the courts from entertaining an employment discrimination complaint brought by a lay employee of a religious institution, even though that

> employee was not holding a position reserved for members of the faith, and even though the defendant employer has never contended that the employee was terminated for religious reasons. (Pet., p. 8).

With respect, Respondent submits that this statement is profoundly misleading. To accept that statement as true would mean that the decision of the Circuit Court below stands for the proposition that a lay employee of a church, such as a janitor or gardener, who has no connection whatsoever with the church's religious message, is incapable of bringing suit under Title VII. No court, anywhere in the United States, has ruled in this manner.

In its decision, the court below discussed at length the facts demonstrating that Petitioner's duties were primarily religious in nature. As the court noted, since "Tomic's duties, unlike those, say, of the person who tunes the organ in St. Mary's Cathedral, had a significant religious dimension, Tomic forfeited his rights under the Act." *Tomic v. Catholic Archdiocese of Peoria*, 442 F.3d 1036, 1041 (7th Cir. 2006).

As to Petitioner's repeated claim that the position of Music Director was not a position reserved for members of the Catholic faith, it is important to determine just how Petitioner arrived at this conclusion as the issue was never raised in the lower courts. The assertion apparently derives from a single sentence in the Petition where Tomic notes that the Handbook "nowhere suggests. . .that petitioner's positions were reserved for persons of the Catholic faith." (Pet., p. 3).

The Handbook does not list the positions reserved for members of the faith nor would one expect that it would. The foundation for Petitioner's inference that no religious considerations were involved in the hiring decision of the Music Director is highly suspect, particularly in light of the

duties of his position which, by definition, require an extensive knowledge of music used in the Catholic liturgy.

The "Position Goal" of the Music Director requires him to assist the Office of Divine Worship in "preparing and celebrating" the diocesan liturgies. (Pet., p. 32a). That provision of the employment agreement demonstrates beyond question that the Music Director plays a prominent and indispensable role in the Catholic worship service. As such, the Music Director must be considered a member of the clergy for purposes of a claim under employment discrimination laws. Any inquiry into the personnel decisions affecting this position are *per se* religious matters and cannot be reviewed by civil courts.

B. In an Area of Law That Continues to Develop, the Circuit Courts Have Applied a Reasoned and Consistent Approach to Addressing the Ministerial Exception to Church Employees' Claims of Employment Discrimination.

Petitioner contends that a serious conflict exists among the Circuits in both the scope and application of the ministerial exception. He suggests that the Fourth, Fifth, Seventh and D.C. Circuits employ a liberal interpretation of the ministerial exemption, whereas the Second, Third and Eighth Circuits have taken a "narrower and more nuanced approach." (Pet., p. 9). An examination of the opinions from these Circuits reveals a remarkable consistency in the outcomes of these cases.

Application of the Ministerial Exception

Although the Petitioner argues that various circuits apply the ministerial exception differently, a close reading of the cases demonstrates to the contrary. While he singles out the Second, Third and Eighth Circuits as different from the Fourth,

Fifth, Seventh and DC Circuits, there are, in actuality, no differences which present any conflict in the Circuits' approach.

As noted above, the Second Circuit has neither explicitly adopted the ministerial exception nor rejected it. But its opinion in *DeMarco v. Holy Cross High School*, 4 F.3d 166 (2nd Cir. 1993), addressed many of the same issues. In *DeMarco*, a lay math teacher brought suit against a parochial school under Title VII. Instead of relying on the ministerial exception, the school argued that the court could not reach the merits because, as a religious school, it was statutorily exempt from the ADEA's anti-discrimination provisions.

The *DeMarco* court was never asked to rule on the ministerial exception, but its ultimate ruling was based, in large part, on many of the same principles. At the outset, the court distinguished a line of cases involving the ministerial exception, finding that these cases "are inapposite, since each one deals with the pervasively religious relationship between a member of the clergy and his religious employer."[5] Accordingly, had DeMarco been an ordained minister, the court may well have adopted the ministerial exception.

However, DeMarco was just a math teacher. Although he did devote some of his time in leading the students in prayer and taking them to Mass, his primary duties were not religious in nature. The Second Circuit allowed the case to proceed, confident that the district judge would be able to focus the trial upon whether Mr. DeMarco was fired because of his age or because of a failure to perform religious duties. *DeMarco*, 4 F.3d at 172.

Had *DeMarco* arisen in the Seventh Circuit, there is little doubt that the court would have concluded that his secular duties outweighed the spiritual and refused to apply the ministerial exception.

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[5] *DeMarco v. Holy Cross High School*, 4 F.3d 166, 171 (2nd Cir. 1993)

Even though the Second Circuit Court of Appeals has not specifically addressed the ministerial exception, the district courts within the Circuit have shown no reluctance to grapple with the issue. In a very recent district court decision from the Second Circuit involving yet another lay teacher suing a parochial school, the court explicitly adopted the ministerial exception to be used in conjunction with the Religious Freedom Restoration Act in resolving the claim. *Redhead v. Conference of Seventh-Day-Adventists*, 2006 WL 2075196 (E.D.N.Y.).

The court concluded that the ministerial exception did not apply as the plaintiff's teaching duties were primarily secular and those religious in nature were limited to only one hour of Bible instruction per day. An examination of this opinion, along with *DeMarco*, suggests that there is no reason to suspect that the Second Circuit's treatment of the ministerial exception is any more "narrow or nuanced" than that of the Seventh Circuit.

Petitioner also identifies the Third Circuit as employing a narrower interpretation of the ministerial exception, citing *Geary v. Visitation of Blessed Virgin Mary Parish School*, 7 F.3d 324 (3rd Cir. 1993), which involved a lay teacher's Title VII claim against her parochial school. The church argued that it fired plaintiff because she violated church doctrine. The Third Circuit opened its analysis with reference to a fundamental principle underlying the ministerial doctrine common to all courts that have addressed the issue: that there is a distinction between cases in which clergy are involved and cases in which employees do not have duties of a religious nature. *Geary*, 7 F.3d at 331.

The court also expressed confidence that courts will continue to consider these situations on a case-by-case basis, looking in each case to see whether the plaintiff's employment discrimination claim can be adjudicated without entangling the court in matters of religion. *Id.*

These two principles lie at the heart of the ministerial exception inquiry as applied by other circuits. In accord with

the First, Fourth, Fifth, Seventh, and Eighth Circuits, the *Geary* decision acknowledged that, in cases involving lay employees who have at least some duties of a religious nature, courts must carefully analyze the extent of those religious duties on a case-by-case basis in order to weigh the risk of entangling the court in matters of religion. Employment discrimination suits by lay parochial school teachers present a particularly difficult example of this inquiry due to the fact that, by definition, at least some of their duties will involve propagation of a church's religious message. The Seventh Circuit has not yet had an opportunity to address a case such as this. But if it does, there is no reason to presume that the outcome would differ appreciably from the outcomes in both *DeMarco* and *Geary*.

The *Geary* court ultimately found that application of the ADEA to this parochial school lay employee would not present a significant entanglement with religion. Even so, the court noted that, as required under *McDonnell Douglas*, she would be required to refute the school's proffer of a legitimate reason for her dismissal. In this case, the school claimed that plaintiff's termination was due to her violation of church doctrine. The *Geary* court warned that "any challenge to the validity or 'plausibility' of the religious reason would of course do damage to the protection afforded Visitation School by the First Amendment." *Geary*, 7 F.3d at 331

In other words, in full accord with the other Circuits, the *Geary* court held that many claims brought by lay employees of a religious organization will raise no serious constitutional questions. To the extent that the claims do impinge on the employer's religious justification, that court's inquiry will come to an immediate halt. Accordingly, to the extent that the court's analysis differs from those of the majority of Circuits, that difference would have been unlikely to produce a different outcome.

Finally, Petitioner identifies the Eighth Circuit as employing a narrower approach to the ministerial exception. In

support, Petitioner cites *Weissman v. Congregation Shaare Emeth*, 38 F.3d 1038 (8th Cir. 1994), which involved a lay employee responsible for supervision of clerical, building maintenance, and custodial personnel. He was a high level janitor who had no role in decisions relating to spiritual matters. It comes as no surprise that the court refused to apply the ministerial exception. Indeed, it is difficult to see how this case can possibly demonstrate a rift with the Seventh Circuit's decision in *Tomic* when the Seventh Circuit, and every other Circuit, would have arrived at the very same conclusion.

Later in the Petition, Tomic argues that the Seventh Circuit's decision in *Alicea-Hernandez v. Catholic Bishop of Chicago*, 320 F.3d 698 (7th Cir. 2003), presents a "particularly striking" conflict with the Eighth Circuit's decision in *Weissman*. Petitioner claims that the temple administrator's role in *Weissman* was "quite similar" to the function of the press secretary in *Alicea-Hernandez*. This is a remarkable statement. Plaintiff in *Weissman* supervised the janitors working in the temple. He had absolutely no role in the dissemination of the temple's message. In contrast, the press secretary in *Alicea-Hernandez* was directly responsible for communicating the church's message to its congregation. To suggest that Weissman's role was in *any way* similar to the duties of Chicago's Archdiocese is disingenuous.

Another decision emanating from the Eighth Circuit. *Scharon v. St. Luke's Episcopal Presbyterian Hospitals*, 929 F.2d 360 (8th Cir. 1991), demonstrates that this Circuit is fully aligned with the majority of Circuits on the issue of the ministerial exception. In that case, an ordained priest, who worked as a chaplain at a church affiliated hospital, filed a claim under Title VII. The court carefully examined the nature of her duties and concluded that her "position as Chaplain is primarily a "ministerial" position." *Scharon*, 929 F.2d at 363. She was not a secular employee who happened to perform

some religious duties. Rather, she was a spiritual employee who also performed some secular duties. *Id.* at 362.

In full accord with the majority of Circuits that have adopted the ministerial exception, the court acknowledged that "courts consistently have subjected the personnel decisions of various religious organizations to statutory scrutiny where the duties of the employees were not of a religious nature." *Scharon*, 929 F.2d at 363, n. 3. The court expressed its confidence that courts will continue to consider these situations on a case-by-case basis, looking in each case to see whether the plaintiff's employment discrimination claim can be adjudicated without entangling the court in matters of religion. Although the Eighth Circuit never used the phrase "ministerial exception" in the *Scharon* decision, the court's analysis, as well as the outcome of the case, is entirely consistent with the majority of Circuits employing the ministerial exception.

Application of the ministerial exception to employment discrimination suits is an issue that continues to develop in the Circuit Courts. Although some differences exist, the courts have consistently embraced the fundamental principles underlying the exception. Cases involving ordained ministers are beyond the purview of the courts. At the opposite end of the spectrum, no exception applies to lay employees who perform no religious duties. As to lay employees whose duties are only partially religious, the courts will engage in a fact-specific analysis and ultimately decide the claims on a case-by-case basis.

Scope of the Ministerial Exception

Petitioner's attempts to demonstrate wide disagreement among the Circuits on the issue of the scope of the exception is similarly unavailing. Petitioner singles out the Seventh Circuit as holding the most expansive interpretation of the exception based on its opinion in *Alicia-Hernandez*, where the court

found that the ministerial exception applied to the Hispanic Communications Manager of the Catholic Diocese of Chicago.

The case presented an issue of first impression, which the court resolved by reference to established case law interpreting the ministerial exception. The court explained that the exception is applied by looking to the function of the employee, not categorical notions of who is or is not a minister. The court engaged in a fact specific analysis of her role in the Church and concluded that a press secretary is often the primary communication link to the general populace. "The role of a press secretary is critical in message dissemination, and a church's message, of course, is of singular importance." *Alicea-Hernandez*, 320 F.3d at 704.

Petitioner contrasts this interpretation of the exception with that of the Fourth and Fifth Circuits arguing that a different standard applies in those Circuits. In doing so, Petitioner neglects to point out that the *Alicea-Hernandez* decision relies almost entirely on Fourth and Fifth Circuit authority to support its conclusion.[6] Indeed, the Seventh Circuit quoted the Fourth Circuit's opinion in *Rayburn*, holding that "perpetuation of a church's existence may depend upon those whom it selects to preach its values, teach its message, and interpret its doctrines both to its own membership and to the world at large."[7] The *Alicea-Hernandez* decision can thus be seen as entirely consistent with decisions of the Fourth and Fifth Circuits.

Petitioner continues to strain to locate some hint of conflict in the Circuits when he argues that the Second, Third, Eighth

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[6] *E.E.O.C. v. Roman Catholic Diocese of Raleigh, N.C.*, 213 F.3d 795 (4th Cir. 2000); *McClure v. The Salvation Army*, 460 F.2d 553 (5th Cir. 1972).

[7] *Alicea-Hernandez v Catholic Bishop of Chicago*, 320 F.3d 698, 704 (7th Cir. 2003), quoting *Rayburn v. General Conference Of Seventh-Day Adventists*, 772 F.2d 1164, 1168 (4th Cir. 1985).

and Ninth Circuits "have allowed discrimination complaints to go forward even when the plaintiffs ['] duties had significant religious components, and in some cases even when the plaintiffs were ministers by any definition." (Pet., p. 16). Petitioner backs off this position in a footnote, conceding that the Eighth and Ninth Circuits have, in fact, applied the exception to members of the clergy, and that the Second Circuit has never addressed the issue. Petitioner's sole authority for the questionable statement quoted above is based on a decision of the Third Circuit, *Petruska*, which has been vacated.

There is, in fact, only one line of cases where the ministerial exception has not been applied to members of the clergy. As discussed above, the Ninth Circuit held in *Bollard* that claims of sexual harassment brought by a member of the clergy, which do not implicate an employment decision, are not barred by the ministerial exception. The court's refusal to apply the exception to these particular cases raises no conflict whatsoever with the other Circuits' application of the ministerial exception. There is no reason to suspect that the majority of Circuits, given the opportunity, would not arrive at the very same conclusion. Other than sexual harassment cases, the Ninth Circuit's treatment of the ministerial exception is consistent with the analyses of the other Circuits.

Petitioner points to a number of decisions from the Second and Third Circuits that allowed the plaintiff to challenge a defendant's proffer of a religious explanation for its employment decision. These decisions stand for the proposition that a court may determine whether the religious reason actually motivated the church's dismissal, so long as the plaintiff does not challenge the validity of the religious doctrine on which the employer relies. It is significant that each of the cases upon which Petitioner relies involve lay teachers suing a parochial school, cases that present the most difficult challenge to the courts' application of the ministerial exception.

Had these cases involved ordained ministers, the inquiry would be resolved without any need to address the defendant's explanation for its employment decision. All Circuits, including the Second and Third, consistently hold that inquiries into employment decisions regarding ministers are *per se* religious matters beyond the court's purview. The same analysis would apply had those decisions involved a music director, like Tomic, whose primary duties involved a prominent and indispensable role in the actual worship service.

Accordingly, the distinction Petitioner raises is confined to a narrow set of circumstances involving lay teachers' claims of employment discrimination against parochial schools, an issue which the Seventh Circuit, and many other Circuits, have not yet had the opportunity to address. As the law on this issue is still in a state of development, and the apparent conflict is confined to a narrow set of circumstances, the issue is not yet ripe for review.

C. The Apparent Conflict Generated by the Second Circuit's Determination That the Religious Freedom Restoration Act Supplants the Ministerial Exception is in the Process of Being Resolved in the Second Circuit and is, Therefore, Not Ripe for Review.

After oral argument in this case, the Second Circuit in *Hankins v. Lyght*, 441 F.3d 96 (2nd Cir. 2006), held (over dissent) that the Religious Freedom Restoration Act,[8] amended the ADEA substituting the RFRA's standard, which requires deciding whether a particular law imposes a substantial burden on religious activity, in place of the ministerial exception. Neither party raised or briefed this issue before the Seventh Circuit.

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[8] 42 U.S.C. §§2000bb *et seq*

The Seventh Circuit found the *Hankins* decision to be unsound and now Petitioner asks this Court to resolve this conflict between the Circuits. A recent district court decision from the Second Circuit, filed on July 27, 2006, appears to have addressed and resolved this apparent conflict.

In *Redhead v. Conference of Seventh-Day-Adventists*, 2006 WL 2075196 (E.D.N.Y.), the district court noted that, in remanding *Hankins* to the district court for reconsideration under the RFRA, the Second Circuit provided no instructions as to how the RFRA should be applied. Since the district court has not yet issued a decision following remand, the court found that it was the first to consider how to analyze an employment discrimination issue under the RFRA.

The court relied on a very recent decision of this Court, *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 126 S.Ct. 1211, 1223, 163 L.Ed.2d 1017 (2006), where this Court reaffirmed the principle that judicially crafted exceptions are relevant when applying the RFRA's compelling interest test. The Court also reaffirmed "the feasibility of case-by-case consideration of religious exemptions to generally applicable rules." *Id.* at 1223.

On this basis, the district court concluded that, even if an analysis of discrimination claims against non-governmental entities under the RFRA is appropriate, the RFRA and the ministerial exception are not mutually exclusive. The court then explicitly adopted the reasoning in *Tomic*, finding that a serious constitutional issue would be presented if Congress, by stripping away the ministerial exception, required federal courts to decide religious questions. The court concluded that the ministerial exception is *necessary* for a case-specific application of the compelling interest test under the RFRA and is the kind of judicially crafted exception envisioned by the Supreme Court in *O Centro Espirita*.

Accordingly, it appears that the apparent conflict between the *Tomic* and *Hankins* decisions is in the process of being

resolved. It should also be noted that the *Hankins* decision is not yet a final decision. To the extent that any conflict remains, the Second Circuit should be afforded the opportunity to settle it. Finally, the *Hankins* decision will also come under attack in a separate appeal in *Rweyemamu v. Cote*, Slip Op. 2006 WL 306654 (D. Conn. 2006), where a notice of appeal is already on file. In all, the issue of any conflict between the ministerial exception and the issue of the Religious Freedom Restoration Act is not ripe for review.

CONCLUSION

WHEREFORE, Respondent CATHOLIC DIOCESE OF PEORIA respectfully requests that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

KAREN L. KENDALL
Counsel of Record
CRAIG L. UNRATH
HEYL, ROYSTER, VOELKER & ALLEN
124 S.W. Adams Street, Suite 600
Peoria, IL 61602
309-676-0400

WILLIAM CARTER
CARR MALONEY P.C.
1615 L Street, NW, Suite 500
Washington, DC 20036
202-310-5500

(3)

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IN THE

Supreme Court of the United States

RICHARD TOMIC,

Petitioner,

v.

CATHOLIC DIOCESE OF PEORIA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

STEPHEN J. THOMAS
JACKSON THOMAS LLP
416 Main Street
Suite 717
Peoria, IL 61602
(309) 637-8888

PAUL R.Q. WOLFSON
Counsel of Record
KELLEY BROOKE SNYDER
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Avenue NW
Washington, DC 20006
(202) 663-6000

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Respondent asserts that there is no disagreement in the lower courts about the scope of the "ministerial exception" to federal anti-discrimination laws, and argues that adjudication of petitioner's claims under the Age Discrimination in Employment Act (ADEA) would run afoul of respondent's First Amendment rights. Neither point is correct.

A. Lay Employees Of Religious Organizations With Comparable Responsibilities Are Covered By The Ministerial Exception In Some Circuits, But Not Others

Respondent argues that no conflict among the circuits warrants this Court's review because the lower courts have consistently concluded that they lack authority to review decisions concerning the hiring and firing of *members of the clergy*. The courts of appeals do agree on that much—but on nothing more.[1] Most significantly for this case, the courts of appeals differ significantly in their approaches to discrimination suits brought by *lay* employees of religious organizations.[2] And although the court below concluded that peti-

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[1] Moreover, as noted in the petition for certiorari, a panel of the Third Circuit recently ruled that a sex discrimination lawsuit brought by a chaplain of a religiously-affiliated university could go forward. That case is being reheard by another panel. *See* Pet. 9 n.9; *Petruska* v. *Gannon Univ.*, 448 F.3d 615, *vacated for panel reh'g*, No. 05-1222, 2006 U.S. App. LEXIS 15088 (3d Cir. June 20, 2006).

[2] It is also unclear what *aspects* of the employment relationship are covered by the ministerial exception. Several circuits have stated broadly that ministers may not challenge the terms of their employment. *See* Pet. App. 6a (decision below; stating that a religious organization must "not be constrained in its dealings with [clergy] by employment laws that would interfere with the church's internal management"); *McClure* v. *Salvation Army*, 460 F.2d 553, 559-560 (5th Cir. 1972) (explaining that "[m]atters touching th[e] relationship" between a minister and his church, including salary, place of assignment, and other duties, "must necessarily be recognized as of prime ecclesiastical concern," and therefore protected by the First Amendment from government interference). Yet recent Ninth Circuit cases allow even ordained ministers—those at the core of the ministerial exception, however defined—to bring sexual harassment claims, including claims for constructive discharge, even though such litigation certainly implicates the terms of a church's relationship with its ministers.

tioner was a "minister" for purposes of the ministerial exception, respondent does not suggest that petitioner is actually a member of the clergy of the Catholic Church; petitioner is a lay organist and music director.

Courts vary markedly in their analysis of which, if any, lay employees are covered by the ministerial exception. The Second, Third, and Eighth Circuits have begun their analysis of lay employees' employment discrimination claims by addressing whether adjudication of the claim poses "'a significant risk that the First Amendment will be infringed.'" *Weissman* v. *Congregation Shaare Emeth*, 38 F.3d 1038, 1042 (8th Cir. 1994) (quoting *NLRB* v. *Catholic Bishop of Chi.*, 440 U.S. 490, 502 (1979)); *see also Geary* v. *Visitation of the Blessed Virgin Mary Parish Sch.*, 7 F.3d 324, 327 (3d Cir. 1993); *DeMarco* v. *Holy Cross High Sch.*, 4 F.3d 166, 169 (2d Cir. 1993). Concluding that the ADEA does not itself require "extensive or continuous administrative or judicial intrusion into the function of religious institutions," *Weissman*, 38 F.3d at 1043; *see also Geary*, 7 F.3d at 328; *DeMarco*, 4 F.3d at 170, those courts then examined the nature of the relationship between the particular plaintiff and the religious organization to determine whether any threat to religious freedom would result from adjudication of the discrimination claim.

All three circuits determined that no such threat would necessarily result from adjudication of ADEA claims brought by lay employees, and in so ruling, all three circuits concluded that cases involving members of the clergy should not be applied to cases involving lay employees. *See Weissman*, 38 F.3d at 1044; *Geary*, 7 F.3d at 331; *DeMarco*, 4 F.3d

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See Elvig v. *Calvin Presbyterian Church*, 375 F.3d 951 (9th Cir. 2004); *Bollard* v. *California Province of Soc'y of Jesus*, 196 F.3d 940 (9th Cir. 1999). Respondent asserts that this line of cases "raises no conflict whatsoever with the other Circuits' application of the ministerial exception." Br. in Opp. 20. To the contrary, these cases show that the Ninth Circuit—unlike the Seventh Circuit and other courts aligned with it—rejects the notion that any inquiry into the employment relationship between ministers and religious organizations is constitutionally forbidden.

at 171. They recognized that some lay employees may have such "pervasively religious" relationships with their employers that it would be impossible to litigate a discrimination suit without running afoul of the First Amendment. *DeMarco*, 4 F.3d at 171-172; *Weissman*, 38 F.3d at 1044 (quoting *DeMarco*). Nonetheless, the Eighth Circuit explicitly declined to expand the ministerial exception to encompass employees who are not members of the clergy. *Weissman*, 38 F.3d at 1044 n.6. The Second and Third Circuits both declined to find that teachers at Catholic schools had such a "pervasively religious" employment relationship that adjudication of their discrimination suits would be constitutionally forbidden, even though the teachers in those cases had significant religious duties. *DeMarco*, 4 F.3d at 172 (finding a teacher who was expected to lead students in prayer did not fall within the ministerial exception); *Geary*, 7 F.3d at 331 (finding a teacher required to serve as a "visible witness to the Catholic Church's philosophy and principles" did not fall within the ministerial exception).

Other courts, by contrast, have taken a much more expansive view of the ministerial exception. Rather than starting with the fundamental question of whether the suit could be litigated without posing a significant risk of interfering with a religious organization's First Amendment rights, these courts have begun (and, generally, ended) with the question whether a lay employee should be categorized as a minister. *See Alicea-Hernandez* v. *Catholic Bishop of Chi.*, 320 F.3d 698, 703 (7th Cir. 2003) ("It is therefore not our role to determine whether the Church had a secular or religious reason for the alleged mistreatment of Alicea-Hernandez. The only question is that of the appropriate characterization of her position."); *EEOC* v. *Roman Catholic Diocese*, 213 F.3d 795, 801-802 (4th Cir. 2000); *EEOC* v. *Catholic Univ. of Am.*, 83 F.3d 455, 463-465 (D.C. Cir. 1996); *Starkman* v. *Evans*, 198 F.3d 173, 175-176 (5th Cir. 1999). If a lay employee falls within their broad definition of "minister," the case is barred, even if the dispute could be decided without any reference to religious doctrine. *Starkman*, 198 F.3d at 175 ("If Ms. Starkman is considered a 'minister' and

falls under the exception, this Court may not inquire into her employment and must dismiss her suit against the Church."); *Catholic Univ.*, 83 F.3d at 464-465; *Alicea-Hernandez*, 320 F.3d at 703; *Roman Catholic Diocese*, 213 F.3d at 801 ("The exception precludes any inquiry whatsoever into the reasons behind a church's ministerial employment decision.").

Moreover, these same courts take a much broader view of which lay employees fall within the ministerial exception. The D.C. and Fifth Circuits include within the exception those "whose *primary functions* serve [the religious organization's] spiritual and pastoral mission." *Catholic Univ.*, 83 F.3d at 463 (emphasis added); *Starkman*, 198 F.3d 173 at 176 (quoting *Catholic Univ.*). The Seventh Circuit barred petitioner's suit because his duties "had a significant religious dimension." Pet. App. 8a. The Fourth Circuit has indicated that the exception applies unless the employee performs "no spiritual function" and has suggested that it would permit only "purely custodial or administrative personnel" to bring suit against a religious employer. *Roman Catholic Diocese*, 213 F.3d at 801.

These approaches would clearly lead to different results in different circuits. The Seventh Circuit, for example, has held that a press secretary was a "minister," and therefore barred from bringing a sex-discrimination suit, because she often served as the "primary communications link" between the church and the general public—even though there was no suggestion that she had a role in any religious ceremony, had any specialized religious training, or served in a leadership role in formulating the church's message. *See Alicea-Hernandez*, 320 F.3d at 703-704. The Second, Third, and Eighth Circuits, by contrast, are likely to have allowed her suit to proceed. In those circuits, the mere fact that a lay employee's "primary functions serve [the religious organization's] spiritual and pastoral mission" or have "a significant religious dimension" is clearly insufficient to require the suit to be dismissed at the pleadings stage.

By contrast with the Seventh Circuit, the Eighth Circuit allowed a temple administrator's ADEA suit to proceed, even though he was required to have a Jewish background, served as the initial contact for prospective members, and acted to promote the image of the temple to members and the broader community. *Weissman*, 38 F.3d at 1040.[3] Like the press secretary in *Alicea-Hernandez*, he often served as the "primary communications link" to the public, *see Alicea-Hernandez*, 320 F.3d at 704, and his "primary functions served [the religious organization's] spiritual and pastoral mission," *Catholic Univ.*, 83 F.3d at 463. The D.C., Fourth, Fifth, and Seventh Circuits, therefore, likely would have barred his suit.[4]

As noted above, the Second and Third Circuits have allowed ADEA suits brought by parochial school teachers with religious duties to proceed past the pleading stage. Respondent dismisses cases involving teachers at parochial schools as not comparable to the current case. Br. in Opp. 14, 16, 21. Yet respondent states that lay employees are properly considered ministers "where their primary duties consist of teaching, spreading the faith, . . . or supervision or participation in religious ritual and worship." *Id.* at 7. As this Court has recognized, teachers in religiously-affiliated

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[3] Respondent asserts (Br. in Opp. 17) that the temple administrator in *Weissman* was nothing more than a "high-level janitor." That reading of *Weissman* is demonstrably incorrect. While the administrator (like the press secretary in *Alicea-Hernandez*) was not involved in making liturgical or doctrinal decisions, he was directly involved in promoting the message of the temple to the membership and the general public.

[4] The Fourth Circuit's decisions are not consistent. *Compare Dole* v. *Shenandoah Baptist Church*, 899 F.2d 1389, 1396 (4th Cir. 1990) (excluding from the ministerial exception teachers who "taught from a pervasively religious perspective, . . . [led] students in prayer and are required to subscribe to the Shenandoah statement of faith as a condition of employment") *with Clapper* v. *Chesapeake Conference of Seventh-Day Adventists*, 166 F.3d 1208, 1998 WL 904528, at *3, *7 (4th Cir. 1998) (including within the exception a teacher who led students in prayer, conducted worship with his students, and incorporated theology into the traditional curriculum).

primary and secondary schools are typically involved in all three of these activities. *See Catholic Bishop of Chi.*, 440 U.S. at 501 (noting "the critical and unique role of the teacher in fulfilling the mission of a church-operated school"); *Lemon* v. *Kurtzman*, 403 U.S. 602, 617 (1971). Courts—and the Catholic Church—have pointed to the "religious significance" of parochial school teachers. *See Little* v. *Wuerl*, 929 F.2d 944, 948 (3d Cir. 1991); *id.* at 948 n.5 (quoting a publication of the National Conference of Catholic Bishops as explaining that "[t]he integration of religious truth and values with the rest of life is brought about in the Catholic school not only by its unique curriculum but, more important, by the presence of teachers who express an integrated approach to learning and living in their private and professional lives"). Indeed, respondent acknowledges that, "by definition, at least some of their duties will involve propagation of a church's religious message." Br. in Opp. 16. Employment decisions concerning teachers at religiously-affiliated schools would therefore seem to "relate to how and by whom churches spread their message." *Id.* at 11; *see Rayburn* v. *General Conference of Seventh-Day Adventists*, 772 F.2d 1164, 1168 (4th Cir. 1985) ("[P]erpetuation of a church's existence may depend upon those whom it selects to preach its values, teach its message, and interpret its doctrines both to its own membership and to the world at large.").

It is difficult to see why parochial school teachers who teach from a religiously-oriented perspective, supervise and participate in worship, and serve as the face and voice of the church on a daily basis *are not* ministers, while a press secretary who has no duties involving religious worship *is* a minister merely because she is involved in promoting her church's message to the public. *Compare Dole* v. *Shenandoah Baptist Church*, 899 F.2d 1389, 1396 (4th Cir. 1990) (excluding from the ministerial exception teachers who "taught from a pervasively religious perspective, . . . [led] students in prayer and are required to subscribe to the Shenandoah statement of faith as a condition of employment") *with Alicea-Hernandez*, 320 F.3d at 704. Given the widely diver-

gent results in the lower courts, this Court's review is needed to provide guidance to the lower courts about the proper scope and application of any constitutionally-based exemption to federal anti-discrimination laws in the context of religious organizations.

B. Litigation Of Petitioner's Claims Would Not Implicate First Amendment Concerns

Although respondent states that all music directors are *per se* members of the clergy,[5] Br. in Opp. 13, 21, it provides no reason to conclude that petitioner's suit would implicate First Amendment concerns. To be sure, petitioner participated in religious ceremonies. *But see DeMarco*, 4 F.3d at 172 (allowing suit to proceed where plaintiff was fired for failing to attend Mass and lead students in prayer). But respondent has never stated that disputes over the manner in which petitioner performed those duties formed the basis for his dismissal. Indeed, Respondent nowhere suggests that petitioner was fired for any religious reason whatsoever. And while respondent (without citation to anything in the record) now characterizes as "highly suspect" the suggestion that "no religious considerations" were involved in hiring petitioner, Br. in Opp. 12, nothing in the job description of petitioner's position in the record requires that the employee in that position be an adherent of the Catholic faith or have completed any course of study involving Catholic doctrine or practices. In any event, at the motion to dismiss stage, all of petitioner's assertions are to be taken as true and all ambiguities are to be resolved in his favor. *See Hishon* v. *King & Spalding*, 467 U.S. 69,73 (1984).

Given this understanding of the music director position that petitioner filled, there is little risk of harm to respondent's First Amendment interests in allowing this suit to proceed. Petitioner does not challenge the ability of reli-

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[5] This contradicts respondent's position elsewhere in its brief that the rights of potential plaintiffs are protected because such decisions must be made on a case-by-case basis. Br. in Opp. 16, 18.

gious organizations to control the hiring and firing of ordained clergy or those who fill positions requiring the same sort of specialized religious training as clergy. This latitude protects respondent's right to make ecclesiastical decisions about the governance of the church. Similarly, since the diocese has made no suggestion petitioner was fired for religious reasons, the court is unlikely to be faced in this case with any disputes about doctrine, avoiding unconstitutional entanglement that would violate the Establishment Clause. Should such an issue arise later in the proceeding, respondent could then move to limit the scope of judicial inquiry in the case. The Seventh Circuit's assertion that the case will "likely" lead the court into a "theological controversy" (Pet. App. 6a) is pure speculation at this stage of the proceeding.

Allowing complaints to proceed where they do not directly implicate First Amendment concerns not only protects these First Amendment rights of religious employers, but also gives force to anti-discrimination statutes whenever possible. Congress's careful exemption for discrimination by religious organizations *based on religion* strongly suggests that Congress intended other anti-discrimination provisions to apply to religious entities.[6] *See DeMarco*, 4 F.3d at 172-173 (concluding that Congress intended the ADEA to apply to religious institutions); *see also Geary*, 7 F.3d at 331; *Weissman*, 38 F.3d at 1045; *Ritter* v. *Mount St. Mary's Coll.*, 814 F.2d 986, 988 n.1 (4th Cir. 1987). Given the broad reach of the ADEA, the application of the ministerial exception amounts, in effect, to a determination that the pertinent law would be unconstitutional as applied to the particular case. The exception, therefore, should be "limited to what is necessary to comply with the First Amendment." *Bollard* v.

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[6] *Compare* 42 U.S.C. § 2000e-1(a) ("This subchapter shall not apply . . . to a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities.") *with* 29 U.S.C. § 621.

California Province of Soc'y of Jesus, 196 F.3d 940, 947 (9th Cir. 1999); *see also United States* v. *Booker*, 543 U.S. 220, 258 (2005) ("[W]e must 'refrain from invalidating more of [a] statute than is necessary.'" (citation omitted)).

C. A Direct Circuit Conflict Exists On Whether The Religious Freedom Restoration Act Supplants The Ministerial Exception

Respondent does not dispute that the decision below and *Hankins* v. *Lyght*, 441 F.3d 96 (2d Cir. 2006) are in direct conflict with respect to the effect of the Religious Freedom Restoration Act (RFRA) on the continued viability of the ministerial exception. Nor does the recent district court decision in *Redhead* v. *Conference of Seventh-Day Adventists*, 2006 WL 2075196 (E.D.N.Y. July 27, 2006), alleviate the conflict. *Redhead* concerns a religious organization's employment decision made on religious grounds. Under those circumstances, as the *Redhead* court notes, it is likely that something akin to the ministerial exception would be constitutionally required to ensure that federal courts were not called upon to decide religious questions. *Id.* at *7. It is far less clear that in a case such as this one, which does not involve religious discrimination, that anti-discrimination laws would place a substantial burden on the religious employer and require analysis under RFRA.

Even if anti-discrimination laws such as the ADEA do cause a substantial burden on religious activity, the Second Circuit made no suggestion that the ministerial exception was the appropriate remedy. Indeed, given the district court's clear disapproval of the Second Circuit's order to apply RFRA and its conclusion that RFRA and the ministerial exception easily co-exist, *see Redhead*, 2006 WL 2075196, at *5 ("The court has strong reservations in proceeding on the assumption that the RFRA is applicable in a suit between private parties . . . ."); *id.* at *7, it is far from clear that the district court's reliance on the ministerial exception follows that mandate and will be upheld by the court on appeal. *See Hankins*, 441 F.3d at 102 ("Whatever the merits of [the ministerial exception] as statutory interpretation or policy, it

has no basis in statutory text, whereas the RFRA, if applicable, is explicit legislation that could not be more on point. Given the absence of other relevant statutory language, the RFRA must be deemed the full expression of Congress's intent with regard to the religion-related issues before us and displace earlier judge-made doctrines that might have been used to ameliorate the ADEA's impact on religious organizations and activities."). Given the uncertainty created by the disagreement between the Second and Seventh Circuits on this issue, lower courts would benefit from clear guidance on the correct approach.

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For the foregoing reasons, and for those set forth in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

STEPHEN J. THOMAS
JACKSON THOMAS LLP
416 Main Street
Suite 717
Peoria, IL 61602
(309) 637-8888

PAUL R.Q. WOLFSON
Counsel of Record
KELLEY BROOKE SNYDER
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Avenue NW
Washington, DC 20006
(202) 663-6000

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